No. 87-1277-CFH
Status: GRANTED

Title: A. L. Lockhart, Director, Arkansas Department of Correction, Petitioner
v.
Johnny Lee Nelson

Docketed:
December 30, 1987

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Clark,John Steven, Miller,Clint

Counsel for respondent: Hall Jr.,John Wesley

NOTE: 11/9/87 ord. granting ext. of time to file pet to & incl. 12/31/87 by Blackmun, J., cited

Entry	Date	Note	Proceedings and Orders
1	Nov 5 1987		Application for extension of time to file petition and order granting same until December 31, 1987 (Blackmun, November 9, 1987).
2	Dec 30 1987	G	Petition for writ of certiorari filed.
3	Dec 30 1987		Appendix of petitioner Lockhart, Dir., AR DOC filed.
4	Jan 25 1988		Brief of respondent Johnny Lee Nelson in opposition filed.
5	Jan 25 1988	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Feb 10 1988		DISTRIBUTED. February 26, 1988
7	Feb 29 1988		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Feb 29 1988		Petition GRANTED.
			**********
9	Mar 10 1988	G	Motion of respondent for appointment of counsel filed.
10	Mar 15 1988		DISTRIBUTED. March 18, 1988. (Motion of respondent for appointment of counsel).
11	Mar 21 1988		Motion for appointment of counsel GRANTED and it is ordered that John Wesley Hall, Jr., Esquire, of Little Rock, Arkansas is appointed to serve as counsel for the respondent in this case.
13	Mar 31 1988		Order extending time to file brief of petitioner on the merits until May 5, 1988.
14	May 4 1988		Joint appendix filed.
15	May 4 1988		Brief of petitioner Lockhart, Dir., AR DOC filed.
16	May 18 1988		Record filed.
		*	Certified copy of C.A. proceedings received.
17	May 24 1988		Record filed.
		*	Certified copy of original record received.
19	May 27 1988		Order extending time to file brief of respondent on the merits until June 27, 1988.
20	Jun 27 1988		Brief of respondent Johnny Lee Nelson filed.
21	Jul 15 1988		Set for argument. Monday, October 3, 1988. (4th case) (1 hr.)
22	Jul 20 1988		CIRCULATED.
23	Jul 27 1988	X	Reply brief of petitioner Lockhart, Dir., AR DOC filed.
24	Oct 3 1988		ARGUED.

87-1277

Supreme Court, U.S.
FILED
DEC 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

A. L. LOCKHART, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION ..... *Petitioner*

vs.

JOHNNY LEE NELSON ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN STEVEN CLARK, ESQ.
Arkansas Attorney General

BY: CLINT MILLER, ESQ.
Assistant Attorney General
HERITAGE WEST BUILDING
201 EAST MARKHAM STREET
LITTLE ROCK, ARKANSAS 72201
(501) 371-3657

Counsel for Petitioner

ARKANSAS LEGISLATIVE DIGEST, INC.

QUESTION PRESENTED

WHETHER, IN A CRIMINAL CASE, AN APPELLATE COURT, AFTER HOLDING THAT CERTAIN EVIDENCE WAS IMPROPERLY ADMITTED AGAINST THE DEFENDANT, SHOULD DETERMINE THE SUFFICIENCY OF THE STATE'S CASE BY CONSIDERING ALL THE STATE'S PROOF THAT WAS ADMITTED INTO EVIDENCE OR BY CONSIDERING ONLY THE REMAINDER OF THE STATE'S PROOF THAT HAD BEEN PROPERLY ADMITTED INTO EVIDENCE.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASON FOR GRANTING THE WRIT 5

This Court should grant certiorari and reverse the Eighth Circuit Court of Appeals because its interpretation of the Fifth and Fourteenth Amendments' former jeopardy clause is in conflict with those reached by a number of other Federal Circuit Courts of Appeal and state appellate courts in cases presenting the same issue.

CONCLUSION 10

APPENDIX ..... A-1—A-12

TABLE OF AUTHORITIES

CASES: Page

Benton v. Maryland, 395 U.S. 784 (1969) 5

Burks v. United States, 437 U.S. 1 (1978) 5

Commonwealth v. Mattingly, 722 S.W.2d 288 (Ky. 1986) 7

Commonwealth v. Taylor, 383 Mass. 272, 418 N.E.2d 1226 (1981) 7

Duncan v. State, 254 Ark. 449, 494 S.W.2d 127 (1973) 3

Greene v. Massey, 437 U.S. 19 (1978) 5

Hall v. State, 244 Ga. 86, 259 S.E.2d 41 (1979) 7

Harris v. State, 284 Ark. 247, 681 S.W.2d 334 (1984) 7

Hobbs v. Commonwealth, 655 S.W.2d 472 (Ky. 1983) 7

In re M.L.H., 399 A.2d 556 (D.C. App. 1979) 6

Lockhart v. Nelson, 828 F.2d 446 (1987) 1, 4

Mulry v. State, 399 N.E.2d 413 (Ind. App. 1980) 7

Nelson v. Lockhart, 641 S. Supp. 174 (E.D. Ark. 1986) ... 4

People v. Sisneros, 44 Colo. App. 65, 606 P.2d 1317 (1980) 7

People v. Taylor, 76 Ill.2d 289, 291 N.E.2d 366 (1979) 7

TABLE OF AUTHORITIES

CASES: Page

Porier v. State, 662 S.W.2d 602 (Tex. Crim. App. 1984)...7

Roeder v. State, 688 S.W.2d 856 (Tex. Crim. App. 1985) 7

Sloan v. State, 584 S.W.2d 461 (Tenn. 1978) 6

State v. Abel, 600 P.2d 994 (Utah 1979).....6

State v. Alexander, 281 N.W.2d 349 (Minn. 1979).....6

State v. Bannister, 60 Haw. 658, 594 P.2d 132 (1979) 6

State v. Boone, 284 Md. 1, 393 A.2d 1361 (1978) 7

State v. Frazier, 162 W.Va. 602, 252 S.E.2d 39 (1979) 7

State v. Gray, 200 Conn. 523, 512 A.2d 217 (1986).....7

State v. Lamorie, 610 P.2d 242 (Utah 1980) 7

State v. Van Isler, 168 W.Va. 185, 283 S.E.2d 836 (1981) ..7

State v. Verdine, 290 Or. 553, 624 P.2d 580 (1981).....7

State v. Wood, 596 S.W.2d 394 (Mo. 1980) 7

United States v. Bibbero, 749 F.2d 581 (9th Cir. 1984) 6

United States v. Gonzalez-Sanchez, 825 F.2d 572 (1st Cir. 1987).....6

United States v. Harmon, 632 F.2d 812 (9th Cir. 1980) ...7

United States v. Hodges, 770 F.2d 1475 (9th Cir. 1985) ...6

TABLE OF AUTHORITIES

CASES: Page

United States v. Key, 725 F.2d 1123 (7th Cir. 1984).....6

United States v. Mandel, 591 F.2d 1347 (4th Cir.), *aff'd.*, 602 F.2d 653 (4th Cir. 1979) 7

United States v. Marshall, 762 F.2d 419 (5th Cir. 1985) ...6

United States v. Sarmiento-Perez, 667 F.2d 1239 (5th Cir. 1982) 7

United States v. Tranowski, 702 F.2d 668 (7th Cir. 1983) 6

Webster v. Duckworth, 767 F.2d 1206 (7th Cir. 1985).....6

STATUTES:

Ark. Stat. Ann. §§41-1001—03 (Repl. 1977) 3

CONSTITUTIONAL PROVISIONS:

Fifth Amendment 2

Fourteenth Amendment.....2

TREATISES:

3 LaFave and Israel, *Criminal Procedure* §24.4 (1979)....8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. _____

A. L. LOCKHART, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION ..... *Petitioner*

vs.

JOHNNY LEE NELSON ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

A. L. Lockhart, Director, Arkansas Department of Correction, the petitioner, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the United States Eighth Circuit Court of Appeals is reported as *Lockhart v. Nelson*, 828 F.2d 446 (1987), and is reprinted in the appendix to this petition. The appendix also includes the Eighth Circuit's judgment in this case and an order issued by Justice Blackmun on November 9, 1987, extending the time in which petitioner Lockhart must file his petition for a writ of certiorari up to and including December 31, 1987.

JURISDICTION

The Eighth Circuit Court of Appeals decided the instant case on September 3, 1987. The Court of Appeals entered its mandate in this case on November 2, 1987. On November 9, 1987, Justice Blackmun granted an extension of time until December 31, 1987, for petitioner to file a petition for a writ of certiorari. This Court has discretionary jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ". . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

On March 12, 1982, a jury in Union County, Arkansas, sentenced respondent Johnny Lee Nelson to twenty years imprisonment in the Arkansas Department of Correction. Nelson had pleaded guilty to underlying charges of burglary and theft of property and had agreed to be sentenced by a jury. Nelson was sentenced as an habitual offender pursuant to Ark. Stat. Ann. §§41-1001—03 (Repl. 1977). The State introduced four prior convictions into evidence against Nelson. Pursuant to §41-1001(2) and §41-1003, the State had to prove beyond a reasonable doubt that Nelson had four prior felony convictions in order to make him eligible for sentencing as an habitual offender. Both the State and Nelson's trial counsel had failed to discover that Nelson had received a gubernatorial pardon for one of the prior convictions. The pardon was of great significance because pardoned prior convictions are inadmissible in Arkansas in habitual offender sentencing proceedings. *See Duncan v. State*, 254 Ark. 449, 452, 494 S.W.2d 127, 129 (1973). The trial court admitted the prior conviction that had been pardoned into evidence because Nelson's trial counsel did not know that the prior conviction had been pardoned and, therefore, did not ask the trial court to rule that it was inadmissible.

After Nelson was incarcerated in the Arkansas Department of Correction, he decided to challenge the validity of his guilty plea. After exhausting his available state court remedies, Nelson filed a petition seeking relief pursuant to 28 U.S.C. §2254 in Federal District Court for the Eastern District of Arkansas. Lockhart moved to dismiss Nelson's petition seeking habeas corpus relief. Upon the order of the District Court, Lockhart's counsel made inquiries, discovered the existence of Nelson's pardon and supplemented Lockhart's motion to dismiss to admit the existence of a pardon for one of

the prior convictions that had been admitted into evidence against Nelson.

After learning of the existence of the pardon the District Court issued a preliminary order on September 20, 1985, in which it held that Nelson was entitled to be resentenced. The District Court appointed counsel to advise Nelson of the risk of going forward with the resentencing. Nelson's appointed counsel filed a response to a subsequent order by the District Court in which he raised the possibility that Nelson may have a Fifth and Fourteenth Amendment former jeopardy defense to any effort by the State to resentence him as an habitual offender. In response to this argument by Nelson's appointed counsel, the District Court issued an order on June 6, 1986 (published as *Nelson v. Lockhart*, 641 S. Supp. 174 [E.D. Ark. 1986]), in which the District Court held that Nelson did have a former jeopardy defense that barred any effort by the State to resentence him as an habitual offender. The Eighth Circuit Court of Appeals affirmed the District Court's order in *Lockhart v. Nelson*, 828 F.2d 446 (1987). Petitioner Lockhart seeks a petition for a writ of certiorari from this Court to review the decision of the Eighth Circuit Court of Appeals that respondent Nelson has a former jeopardy defense arising from the Fifth and Fourteenth Amendments which bars any effort by the State of Arkansas to resentence him as an habitual offender.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI AND REVERSE THE EIGHTH CIRCUIT COURT OF APPEALS BECAUSE ITS INTERPRETATION OF THE FIFTH AND FOURTEENTH AMENDMENTS' FORMER JEOPARDY CLAUSE IS IN CONFLICT WITH THOSE REACHED BY A NUMBER OF OTHER FEDERAL CIRCUIT COURTS OF APPEAL AND STATE APPELLATE COURTS IN CASES PRESENTING THE SAME ISSUE.

This is a *Burks*-type case. *Burks v. United States*, 437 U.S. 1 (1978) holds that for former jeopardy purposes an appellate court's decision that the evidence against a defendant was insufficient is the equivalent of a jury's verdict of acquittal. The instant case presents the issue left open by this Court in *Burks'* companion case, *Greene v. Massey*, 437 U.S. 19, 26 n.9 (1978): once an appellate court has concluded that a criminal defendant's trial should be reversed because the jury received and considered inadmissible evidence, should the court consider the inadmissible evidence and the remainder of the state's proof or should the court consider only the remainder of the state's case in deciding whether the defendant has a Fifth and Fourteenth Amendment former jeopardy right not to be retried because the State failed to put sufficient evidence before the jury.[1] In the instant case the Eighth Circuit Court of Appeals evaluated respondent Nelson's former jeopardy claim by considering only that part of the State's case that had been properly admitted against him.

Specifically, the Eighth Circuit concluded that Nelson's Fifth and Fourteenth Amendment right not to be punished

---

[1]The due process clause of the Fourteenth Amendment incorporates the Fifth Amendment's prohibition against placing a defendant twice in jeopardy. *Benton v. Maryland*, 395 U.S. 784 (1969).

twice for the same offense barred the State from resentencing Nelson as an habitual offender because one of the four prior convictions that the jury had considered in sentencing Nelson as an habitual offender was inadmissible, as a matter of state law, in habitual offender sentencing proceedings. There had been no objection at Nelson's state sentencing hearing to the admission into evidence of the inadmissible prior conviction because Nelson's trial counsel failed to realize that the prior conviction was inadmissible.

In refusing to consider all of the State's evidence, inadmissible as well as admissible, in deciding whether Nelson has a former jeopardy right not to be resentenced as an habitual offender by the State of Arkansas, the Eighth Circuit joined five other lower appellate courts that evaluate *Burks*-type former jeopardy claims only on the basis of evidence that was properly before the jury. These lower appellate courts are as follows: *In re M.L.H.*, 399 A.2d 556, 558-59 (D.C. App. 1979); *State v. Bannister*, 60 Haw. 658, 594 P.2d 132 (1979); *State v. Alexander*, 281 N.W.2d 349, 354 (Minn. 1979); *Sloan v. State*, 584 S.W.2d 461, 472 (Tenn. 1978); and *State v. Abel*, 600 P.2d 994, 998-9 (Utah 1979). This disposition of a *Burks*-type former jeopardy issue in cases where evidence was improperly before the jury conflicts with the analytical approach taken by the majority of lower court jurisdictions. The majority of lower appellate courts consider the entire state's case in deciding a *Burks*-type former jeopardy claim where some of the state's evidence was improperly before the jury. This majority of lower appellate courts is as follows: *United States v. Gonzalez-Sanchez*, 825 F.2d 572, 588 n.57 (1st Cir. 1987); *United States v. Marshall*, 762 F.2d 419, 423 (5th Cir. 1985); *Webster v. Duckworth*, 767 F.2d 1206, 1214-16 (7th Cir. 1985); *United States v. Hodges*, 770 F.2d 1475, 1477-78 (9th Cir. 1985); *United States v. Bibbero*, 749 F.2d 581, 586 n.3 (9th Cir. 1984); *United States v. Key*, 725 F.2d 1123, 1127 (7th Cir. 1984); *United States v. Tranowski*, 702 F.2d 668, 671 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984); *United*

States v. Sarmiento-Perez, 667 F.2d 1239 (5th Cir.), *cert. denied*, 459 U.S. 834 (1982); *United States v. Harmon*, 632 F.2d 812 (9th Cir. 1980); *United States v. Mandel*, 591 F.2d 1347, 1373-74 (4th Cir.), *aff'd.*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984); *People v. Sisneros*, 44 Colo. App. 65, 606 P.2d 1317 (1980); *State v. Gray*, 200 Conn. 523, 538-40, 512 A.2d 217, 225-6 (1986); *Hall v. State*, 244 Ga. 86, 259 S.E.2d 41 (1979); *People v. Taylor*, 76 Ill.2d 289, 309, 291 N.E.2d 366, 375 (1979); *Mulry v. State*, 399 N.E.2d 413, 419 (Ind. App. 1980); *Commonwealth v. Mattingly*, 722 S.W.2d 288 (Ky. 1986); *Hobbs v. Commonwealth*, 655 S.W.2d 472 (Ky. 1983); *State v. Boone*, 284 Md. 1, 16-7, 393 A.2d 1361, 1369 (1978); *Commonwealth v. Taylor*, 383 Mass. 272, 281-82, 418 N.E.2d 1226, 1233 (1981); *State v. Wood*, 596 S.W.2d 394 (Mo.), *cert. denied*, 449 U.S. 876 (1980); *State v. Verdine*, 290 Or. 553, 624 P.2d 580 (1981); *Roeder v. State*, 688 S.W.2d 856 (Tex. Crim. App. 1985); *Porier v. State*, 662 S.W.2d 602, 606 (Tex. Crim. App. 1984); *State v. Lamorie*, 610 P.2d 242, 346 (Utah 1980); *State v. Van Isler*, 168 W.Va. 185, 283 S.E.2d 836 (1981); and *State v. Frazier*, 162 W.Va. 602, 614-15, 252 S.E.2d 39, 50-3 (1979). The federal courts of appeal and state supreme courts that consider the state's entire case in deciding *Burks*-type cases do so to avoid invading the province of the jury and to make sure that the state has the benefit of correct trial court rulings excluding evidence. As the Fourth Circuit Court of Appeals held in *Mandel, supra*, had the improperly admitted evidence not been admitted, it is impossible to say what other evidence the government might have brought forward or what other theory of the case the government might have pursued. *Id.* at 1374. The procedure followed by the Fourth Circuit Court of Appeals in *Mandel* and in the other lower appellate courts that follow *Mandel* furthers judicial economy because it spares the state from the necessity of overtrying its case by offering into evidence every scrap of proof, no matter how questionable. The state is forced to "throw in the kitchen sink" to avoid reversal and dismissal by

appellate courts that separate the admissible evidence from the inadmissible and review only the admissible evidence in deciding the *Burks* issue. *See Boone, supra* and *Wood, supra*. Professors LaFave and Israel note that the *Mandel* procedure is the better procedure. 3 W. LaFave and J. Israel, *Criminal Procedure*, §24.4 n.29 (1984). As LaFave and Israel observe at page 91 of 3 *Criminal Procedure*, if the *Mandel* rule is not followed, the State has not received "one fair opportunity" to make its proof. Where the state has not received "one fair opportunity" to present its case, former jeopardy considerations do not bar a retrial of the defendant. *Burks, supra* at 15-6. Moreover, the *Mandel* procedure is consistent with *Burks*' literal equation of an appellate court's decision that the state's proof was insufficient with a jury's verdict of acquittal. In *Burks*-type cases like the instant case, the evidence found by the appellate court to be inadmissible had been before the jury and the jury, of course, had no right to find that certain pieces of evidence offered by the state were inadmissible — if an appellate court's decision that the state's evidence was not sufficient is to be a *true* equivalent of a jury's verdict of acquittal for former jeopardy purposes, then appellate courts should consider the same state's case that the jury considered. The continued existence of this conflict among lower appellate courts is unjust — the protection against former jeopardy decided by the Fifth and Fourteenth Amendments cannot be greater for defendants who happen to be tried in the Eighth Circuit Court of Appeals' jurisdiction and lesser for defendants who happen to be tried in jurisdictions that follow the *Mandel* procedure.

The Eighth Circuit attempts to avoid a conflict with the *Mandel* line of cases by noting that in the instant case there was no *Burks*-type "trial error" because the state trial court did not specifically rule on the admissibility of the prior conviction that subsequently turned out to be inadmissible. (A-6) In making this facile distinction, the Eighth Circuit fails to

explain why it is that a defendant's former jeopardy right should depend upon whether his counsel made an objection at trial. Presumably, had Nelson's trial counsel made an objection to the admissibility of the prior conviction that was later discovered to be inadmissible and had this objection been overruled, then the Eighth Circuit would have reversed and remanded. *See Burks* at 15 and *Hobbs v. Commonwealth, supra*. Moreover, the Eighth Circuit's insistence that there can be no trial error in the absence of explicit ruling, albeit erroneous, by the trial court is contrary to this Court's teaching in *Burks* that incorrect *receipt* of evidence is trial error — this Court did not hold in *Burks* that the trial court must explicitly rule on the admissibility of the state's evidence, but held merely that trial error occurs if evidence that is before the jury creates a ". . . judicial process which is defective in some fundamental respect. . . ." *Burks* at 15. There is no doubt that Nelson's jury had before it evidence — the inadmissible prior conviction — that prejudiced him in a fundamental way.

In summary, the instant case gives the Court the opportunity to resolve the issue left unresolved in *Greene v. Massey, supra* and, in so doing, resolve a split of authority between lower state and federal courts of appeal. At present, the existence of this split of authority creates an unjust differential in the level of former jeopardy protection accorded to defendants in criminal cases. Petitioner Lockhart respectfully requests that this Court grant a writ of certiorari to the Eighth Circuit Court of Appeals, reverse that court's decision in *Lockhart v. Nelson*, 828 F.2d 446 (1987) and adopt as a matter of Fifth and Fourteenth Amendment former jeopardy jurisprudence the holding of *Mandel v. United States, supra*, discussed above.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN STEVEN CLARK, ESQ.
Arkansas Attorney General

BY: CLINT MILLER, ESQ.
Assistant Attorney General
HERITAGE WEST BUILDING
201 EAST MARKHAM STREET
LITTLE ROCK, ARKANSAS 72201
(501) 371-3657

Counsel for Petitioner

APPENDIX

Johnny Lee NELSON, Appellee,

v.

A. L. LOCKHART, Director, Arkansas Dept. of Correction, Appellant.

No. 86-1872.

United States Court of Appeals, Eighth Circuit.

Submitted April 13, 1987.

Decided Sept. 3, 1987.

Clint Miller, Asst. Atty. Gen., Little Rock, Ark., for appellant.

John Wesley Hall, Jr., Little Rock, Ark., for appellee.

Before LAY, Chief Judge, and ARNOLD and WOLLMAN, Circuit Judges.

LAY, Chief Judge.

Johnny Lee Nelson pled guilty in Arkansas state court to burglary and theft after taking forty-five dollars from a vending machine. He agreed to be sentenced by a jury pursuant to the state's habitual criminal offender act. Ark. Stat. Ann. §41-1001(2)(c) (Repl. 1977). After the state introduced four prior felony convictions, Nelson received a twenty year sentence. The state now concedes that one of the felonies had, in fact, been pardoned. Nelson sought a writ of habeas corpus in the federal district court on the ground that use of the pardoned offense bars a second enhancement proceeding under principles of double jeopardy. The United States District Court for the Eastern District of Arkansas, the Honorable G. Thomas Eisele, Chief Judge, presiding, held that the Double Jeopardy Clause precludes a retrial under the

habitual offender statute.[1] *Nelson v. Lockhart*, 641 F.Supp. 174 (E.D. Ark. 1986). We affirm.

As the district court observed, the Supreme Court held that double jeopardy attaches in a hearing on sentencing where the sentencing procedure "was itself a trial on the punishment • • •." *Bullington v. Missouri*, 451 U.S. 430, 438, 101 S.Ct. 1852, 1858, 68 L.Ed.2d 270 (1981). In the instant case, the district court found that the sentencing procedure constituted a trial on the issue of sentencing. *Nelson v. Lockhart*, 641 F.Supp. at 180. The procedure of introducing evidence of prior convictions "resemble[d] a trial wherein both sides present evidence, examine and cross-examine witnesses, and the prosecution carries the burden of proof beyond a reasonable doubt."[2] *Id.* at 180.

[1]Petitioner was incarcerated on July 22, 1980. On July 24, 1986, subsequent to the issuance of this writ of habeas corpus, petitioner was released on bail by the state court pending this appeal. At the time of his release, petitioner had served six years. The range for punishment under the habitual offenders act is twenty to forty years. Ark. Stat. Ann. §41-1001(2)(c) (Repl. 1977). If the petitioner cannot be sentenced under the act, the range of punishment on the underlying charge is only five to twenty years. Ark. Stat. Ann. §41-901(1)(c) (Repl. 1977).

[2]Under the practice followed in Arkansas, it had been the jury's responsibility to determine if there was adequate proof of the defendant's conviction of prior felonies. The 1977 Replacement to the Arkansas Statutes Annotated, however, changed this so that now the trial court has the responsibility of making a finding as to the defendant's guilt of prior felonies. Ark. Stat. Ann. §41-1005(2) (Repl. 1977). After the prosecutor has introduced evidence of the defendant's guilt of other felonies, the defendant may controvert the prosecutor's proof. *Id.* Although the revised statute was in force at the time of Nelson's trial, the state trial court nonetheless followed the old procedure in submitting the determination of Nelson's guilt of other felonies and his over-all sentencing to the jury. No objection was made by either side and we review the double jeopardy issue under the procedure actually followed.

While conceding that it "erred in introducing into evidence a prior conviction of Nelson's that had been pardoned,"[3] the state argues that this was simply trial error and that the state is entitled to retry petitioner by using proof of other valid convictions. Petitioner contends that double jeopardy bars a second hearing on enhanced punishment.

[1] A defendant cannot invoke immunity from a second prosecution under the Double Jeopardy Clause if the first conviction was reversed due solely to trial error. *United States v. Tateo*, 377 U.S. 463, 465, 84 S.Ct. 1587, 1589, 12 L.Ed.2d 448 (1964). Unlike reversal for insufficiency of evidence, reversal for trial error:

> implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct.

Burks v. United States, 437 U.S. 1, 15, 98 S.Ct. 2141, 2149, 57 L.Ed.2d 1 (1977).

[2] In support of its argument that admitting the pardoned conviction was mere trial error, the state urges this court to follow the rule set out in *United States v. Mandel*, 591 F.2d 1347, 1373-74 (4th Cir. 1979), *cert. denied*, 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980). While *Mandel* recognizes the traditional rules that reversal for evidentiary insufficiency precludes granting the government a second opportunity to prosecute, *id.* at 1373, and that reversal for trial error does not preclude a second prosecution, *id.*, *Mandel* applies a special

[3]Under Arkansas law a pardoned conviction may not serve as a basis for sentence enhancement under the recidivist statute. *Duncan v. State*, 254 Ark. 449, 452, 494 S.W.2d 127, 129 (1973).

rule in cases where there is both trial error and insufficient evidence. In those cases, where the trial error was to admit evidence that should have been held inadmissible, *Mandel* suggests that appellate courts not "to adjudicate the sufficiency of the balance of the evidence," *id.* at 1374, because appellate courts should not act as triers of fact. *Id.* at 1374. Whatever the merits or concerns of such a rule, it is settled that if the state fails to provide sufficient evidence to establish the defendant's guilt, then principles of double jeopardy apply. *Burks v. United States*, 437 U.S. at 11, 98 S.Ct. at 2147.

The essence of the Double Jeopardy Clause is that it "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks*, 437 U.S. at 11, 98 S.Ct. at 2147. Thus, if the jury's determination on Nelson's additional sentence was equivalent to a trial on that issue, then a second prosecution is barred under the Double Jeopardy Clause. The district court found that the proceedings had "all the 'hallmarks of the trial on guilt or innocence'." *Nelson v. Lockhart*, 641 F.Supp. at 180 (quoting *Bullington v. Missouri*, 451 U.S. at 439, 101 S.Ct. at 1858). The state had the "burden of proving some factual proposition beyond a reasonable doubt as a predicate to the jury's having discretion to impose a more serious sentence." *Nelson v. Lockhart*, 641 F.Supp. at 180.[4]

Bullington, upon which the district court relied in finding that there was a trial on the issue of punishment, states clearly the relevant factors in determining whether the

[4]Arkansas law imposed on the prosecutor the conventional burden of proof to invoke the state's habitual offender statute:

> A previous conviction or finding of guilt of a felony may be proved by any evidence that satisfies the trial court beyond a reasonable doubt that the defendant was convicted or found guilty.

Ark. Stat. Ann. §41-1003 (Repl. 1977).

sentencing hearing constituted a trial on that issue. In *Bullington* the petitioner had been convicted of first degree murder. 451 U.S. at 435, 101 S.Ct. at 1856. The applicable Missouri statute required a pre-sentence hearing of any defendant convicted of capital murder. *Id.* at 433 n. 4, 101 S.Ct. at 1855 n. 4. After hearing argument by the defendant and the prosecutor, *id.* at 433-34, 101 S.Ct. at 1855-56, the jury had to determine if the prosecutor had established aggravating circumstances beyond a reasonable doubt. The jury found Bullington guilty of capital murder and the same jury returned an additional verdict fixing Bullington's punishment at life imprisonment without eligibility of probation or parole for fifty years. *Id.* at 435-36, 101 S.Ct. at 1856-57.

After the jury's verdict was received, Bullington moved for and was granted a new trial.[5] Because there was to be a new trial, the prosecution served notice that it intended to try to obtain the death penalty even though the earlier jury had granted only a life sentence. Bullington moved to strike the notice, arguing that the Double Jeopardy Clause barred "the imposition of the penalty of death when the first jury had declined to impose the death sentence." *Id.* at 436, 101 S.Ct. at 1857.

[3] The Supreme Court found that because the "sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury [was] available to him, with respect to the death penalty, at his

[5]After Bullington filed this motion for a new trial, the Supreme Court held that Missouri's practice of allowing women an automatic exemption from jury service was unconstitutional because it deprived the defendant of his right to a jury drawn from a fair cross section of the community. *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). Relying on *Duren*, the trial court granted Bullington's motion for a new trial.

retrial." *Id.* at 446, 101 S.Ct. at 1862. Under *Bullington*, then, double jeopardy attaches to sentencing proceedings if the process of determining the defendant's punishment was similar to the process of determining guilt. Because the jury's determination of Nelson's sentencing had the same procedural protections as his trial for theft and burglary, we agree with the trial court's holding that the principles of *Bullington* are controlling.

We reject the state's argument for several reasons. First, the facts here show that the state failed to prove that the defendant had been convicted of four felonies. The state proved only three valid convictions and the jury verdict of guilt under the habitual offender act, which requires four felony convictions, was mistaken. Second, the admission of the pardoned conviction was not trial error; the trial court did not rule on the admissibility of the conviction that the defendant claimed was pardoned by Governor Faubus.[6] While the conviction in

---

[6]The state seeks to capitalize on this fact by claiming defense counsel was ineffective. This argument borders on absurdity. Based on the trial record, as meticulously set forth by Judge Eisele, the proof of the pardoned conviction was pursued by the state notwithstanding the petitioner's testifying that he had been pardoned for the specific offense in question. The prosecutor stated:

> **PROSECUTOR**: Your Honor, I feel compelled at this time to make a motion to strike this testimony because I think the defendant is in error. I think he's confused as to the meaning of the pardon and a commutation. Now I hesitate to allow the jury to hear this and become confused and I would ask the Court to strike the testimony. It's hearsay — would be another stated objection. I think the records are clear that are in the court and perhaps some comment by the Court to the jury could clear the matter up.
>
> **THE COURT**: I think he cleared it up himself when he said it was commuted to time served. Is that what you said?
>
> **NELSON**: Yes, sir.
>
> **THE COURT**: Does that answer your question? It was commuted to time served. It's not a pardon. Do you agree, Mr. Keaton?
>
> **DEFENSE COUNSEL**: Well that's the way it sounds to me.
>
> **THE COURT**: That's what he said in this last statement.
>
> **DEFENSE COUNSEL**: All right.

Nelson v. Lockhart, 641 F.Supp. at 182-83.

The prosecutor, who had the burden of proof, moved unflinchingly ahead without verifying the authenticity of the state's proof. The state now attempts to blame the defendant for not proving the pardon. This conveniently overlooks that the state had the burden of proof. Nevertheless, it is clear the trial court had no motion or objection to strike the state's proof of the invalid conviction. As Judge Eisele observed:

> The truth is that the state could not have provided any evidence to rebut the petitioner's contention because it did not exist. The Arkansas Supreme Court has clearly held that the prosecutor must carry the significant burden of ferreting out information regarding the validity of prior convictions whenever he seeks enhancement. *Roach v. State*, 255 Ark. 773, 778, 503 S.W.2d 467 (1973). It is the prosecutor who can and should check out the validity of the convictions he wishes to rely on. The state's responsibility to thoroughly investigate its claims in a criminal proceeding is always acute. And this should be especially evident to prosecutors who seek to send someone to the penitentiary for a term of 20 to 40 years on a predicate felony involving the theft of $45.00. They may ignore this incumbent obligation at the peril of their case for enhancement.

question was indeed submitted to the jury, Nelson had not engaged in any misconduct. For example, the petitioner did not deceive the court or the prosecutor as to the status of the pardoned conviction. In fact, he did all he could have been expected to do to make the court and prosecutor aware of his pardon. Responsibility for the evidence submitted remained with the prosecution.

Third, the *Mandel* case, upon which the state relies heavily, is inapplicable. In *Mandel* there was a "vast volume of evidence . . ." 591 F.2d at 1373. By contrast, the State of

Arkansas had introduced only four felony convictions in this case. In addition, *Mandel* was concerned with needless multiplicity of evidence, and the rule in that case was concerned with the competency of appellate courts to act as triers of fact. Neither of these concerns are raised in this case because there was no repetitious or duplicative evidence submitted on the habitual offenders count nor is there any difficulty for the appellate court in determining if the pardoned conviction was inadmissible. It unarguably was not admissible. Without the fourth conviciton, the state has failed to provide sufficient evidence. Thus, even if we were to adopt *Mandel*, which we do not, the rule in that case would not support the state's position.

Finally, we reject the state's argument because the district court was correct in its application of ***Bullington v. Missouri***. As stated earlier, ***Bullington*** held that the Double Jeopardy Clause was invoked where "the sentencing procedure at petitioner's first trial was like the trial on the question of guilt or innocence . . ." *Id.* at 446, 101 S.Ct. at 1862. The statute in question is an evidentiary statute which requires the state to prove Nelson's prior felonies beyond a reasonable doubt. *Nelson v. Lockhart*, 641 F.Supp. at 179.[7]

[7]The procedure used in sentencing under the habitual offender act supports a finding that double jeopardy attached. Arkansas law construes the habitual offender act as a statute allowing the jury to enhance punishment for an underlying felony, *Finch v. State*, 262 Ark. 313, 317, 556 S.W.2d 434, 436, (1977), and not as a distinct offense, *Harrison v. State*, 287 Ark. 102, 104, 696 S.W.2d 501, 502 (1985). Even though the habitual offender statute merely served to enhance Nelson's sentence, however, the sentencing procedure constituted a trial on the issue of punishment. That is, the jury had to decide whether the prosecutor had proved beyond a reasonable doubt that the defendant had committed four felonies. Furthermore, and as is required under the habitual offender act, the defendant was given the opportunity to controvert the state's evidence. Because of the similarities between the trial on the underlying felony and the hearing on sentencing, *Bullington v. Missouri*, 45 U.S. at 446, 101 S.Ct. at 1862 bars a second trial on enhancement of punishment.

The Fifth Circuit has addressed the issue we are faced with and held in ***Briggs v. Procunier***, 764 F.2d 368, 372 (5th Cir. 1985) that double jeopardy attaches to an initial hearing on a defendant's status as an habitual offender:

> We hold that double jeopardy prevented the retrial of Briggs as an habitual offender even though the state alleged different prior felonies in its second indictment. • • • In other words, once the state has failed to prove that the defendant is an habitual offender with respect to one predicate offense, for example, the burglary here, it may not seek to sentence him as an habitual offender for that underlying crime. *Briggs*, 764 F.2d at 372-73.[8]

We adopt the reasoning in *Briggs*. Accordingly, the judgment and order of the district court are affirmed.[9]

[8]Several cases from the Fifth Circuit Court of Appeals hold that where the state has failed to prove a prior conviction, double jeopardy precluded retrial under a recidivist statute. *See Briggs v. Procunier*, 764 F.2d 368 (5th Cir. 1985); *French v. Estelle*, 692 F.2d 1021 (5th Cir. 1982), *cert. denied*, 461 U.S. 937, 103 S.Ct. 2108, 77 L.Ed.2d 313 (1983); *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982), *vacated on other grounds*, 459 U.S. 1139, 103 S.Ct. 776, 74 L.Ed.2d 987 (1983). The state urges that these decisions, however, did not involve the admission of inadmissible evidence at trial, the exclusion of which would have tainted the factual findings and rendered them insufficient. In each case, however, the evidence as submitted was patently insufficient to support the convictions. *See Briggs*, 764 F.2d at 369 (after jury empaneled, state dismissed enhancement counts barred by double jeopardy); *French*, 692 F.2d at 1350 (failure to prove defendant's identity as convicted felon in a prior conviction rendered evidence insufficient to support findings as an habitual criminal.) Because the evidence as submitted at Nelson's sentencing was insufficient, the rationale of these Fifth Circuit decisions supports our holding.

[9]Because ***Bullington*** applies, a second trial on the issue of sentence enhancement is barred. Accordingly, Nelson's sentence will be reduced to remove the prejudice stemming from the habitual offender act. Arkansas state courts would treat the matter similarly. Upon finding defects in the prosecutor's proof as to prior felonies,

Arkansas courts reduce the defendant's punishment to the minimum possible sentence. *Leggins v. State*, 267 Ark. 293, 297, 590 S.W.2d 22, 24 (1979); *McConahay v. State*, 257 Ark. 328, 331-32, 516 S.W.2d 887, 889 (1974); *Roach v. State*, 255 Ark. 773, 779, 503 S.W.2d 467, 471 (1973). Reductions in sentencing were typically contingent upon the prosecution's decision not to retry the case. *Leggins v. State*, 267 Ark. at 297, 590 S.W.2d at 25; *McConahay v. State*, 257 Ark. at 331-32, 516 S.W.2d at 889; *Roach v. State*, 255 Ark. at 779, 503 S.W.2d at 471.

Supreme Court of the United States

No. A-364

A. L. LOCKHART, Director, Arkansas Department of Corrections ..... *Applicant*

v.

Johnny Lee NELSON

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 31, 1987.

/s/ Harry A. Blackmun
Associate Justice of the Supreme Court of the United States

Dated this 9th day of November, 1987.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 86-1872EA	•	
	•	
Johnny Lee Nelson,	•	
	•	
Appellee,	•	
	•	
v.	•	Appeal from the United States
	•	District Court for the
A. L. Lockhart, etc.,	•	Eastern District of Arkansas.
	•	
Appellant.	•	
	•	

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment and order of the district court are affirmed in accordance with the opinion of this Court.

September 3, 1987

A true copy.
ATTEST: Clerk, U.S. Court of Appeals, Eighth Circuit

MANDATE ISSUED 11/19/87

87-1277

FILED
DEC 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

A. L. LOCKHART, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION ..... *Petitioner*

vs.

JOHNNY LEE NELSON ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL APPENDIX

JOHN STEVEN CLARK, ESQ.
Arkansas Attorney General

BY: CLINT MILLER, ESQ.
Assistant Attorney General
HERITAGE WEST BUILDING
201 EAST MARKHAM STREET
LITTLE ROCK, ARKANSAS 72201
(501) 371-3657

Counsel for Petitioner

ARKANSAS LEGISLATIVE DIGEST, INC

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. _____

A. L. LOCKHART, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION ..... *Petitioner*

vs.

JOHNNY LEE NELSON ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL APPENDIX

Johnny Lee NELSON *v.* A. L. LOCKHART

No. PB-C-85-39

United States District Court,
E.D. Arkansas, Pine Bluff Division

June 6, 1986

John Wesley Hall, Jr., Little Rock, Ark., for plaintiff.

Clint Miller, Asst. Atty. Gen., Little Rock, Ark., for defendant.

ORDER

EISELE, Chief Judge.

Petitioner Johnny Lee Nelson pled guilty to burglary, a class B felony, and misdemeanor theft, after taking $45.00 from a vending machine in 1979. Petitioner was then sentenced by a jury under the Arkansas Habitual Offender statute to twenty years imprisonment. The state court jury which sentenced Nelson did so on the basis of evidence of four prior felony convictions introduced by the state in the course of a separate sentencing proceeding subsequent to petitioner's plea of guilt.[1] In his habeas corpus petition now pending before the Court, petitioner asserts that he had earlier received a gubernatorial pardon from one of these four convictions and, therefore, the enhanced sentence is invalid.

In response, the state initially argued that the petitioner's sentence for the felony conviction at issue had been commuted,

[1]Upon proof of four such convictions the jury could have imposed an enhanced sentence ranging from twenty years to forty years.

not pardoned, and it thus was permissible to use that conviction to obtain the enhanced sentence. Upon further inquiry, however, it became apparent that the petitioner had in fact been pardoned by an executive proclamation on November 13, 1964, of a 1960 rape conviction, relating to case number 9078 in Union County, Arkansas. The state now acknowledges the fact of petitioner's pardon and it is also undisputed that under Arkansas case law, a pardoned conviction may not serve as the basis for an enhanced sentence. *Duncan v. State*, 254 Ark. 449, 494 S.W.2d 127 (1973).

After reviewing the updated record, the Court issued an order on September 20, 1985. Therein the Court indicated that although the petitioner's trial attorney made no contemporaneous objection to the use of the pardoned conviction, counsel's failure to object constituted ineffective assistance of counsel, and thus *Wainwright, Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), would not prevent the Court from considering the petition. The Court further indicated that the revelation of the pardon made it likely that a writ of habeas corpus would be granted unless the state resentenced the petitioner. Before proceeding further, however, the Court appointed counsel to advise the petitioner of his legal rights and, in particular, to confer with him about the risks of going forward in view of the possibility that a resentencing of petitioner might result in his receiving a sentence in excess of twenty years.

The state subsequently expressed, through a letter to the Court, its intention to resentence the petitioner. This raised the prospect that the petitioner might well receive a longer sentence than the one rendered invalid by the pardon, since petitioner had other prior felony convictions not offered or introduced at the initial sentencing, and since he had received the minimum sentence within a wide possible range. Assuming that the state would be allowed to resentence the petitioner and that the state would then introduce other prior

felony convictions not introduced in the previous sentencing proceeding, his attorney counseled petitioner against pursuing the habeas claim. Counsel reported to the Court that he had so advised his client but that the petitioner nevertheless desired to continue the case. Shortly thereafter the Court issued another order in which it indicated that if, after conferring with his counsel again, petitioner still wished to go forward, the Court would require the petitioner to appear so that the Court could satisfy itself that the petitioner understood the possible consequences of his decision. Prior to the date of any hearing, however, petitioner's counsel brought to the Court's attention the possibility that the state might be entirely barred from resentencing the petitioner as an habitual offender upon the present conviction.

Petitioner has raised a very serious issue which warrants careful reexamination of the case in light of the Double Jeopardy Clause of the Fifth Amendment. Having completed this reexamination, the Court now concludes that its earlier expressions suggesting that the state would be able to resentence the petitioner were erroneous. The Court now finds that the Writ of Habeas Corpus must be granted because the state failed to satisfy the evidentiary requirements necessary to sentence the petitioner as an habitual offender under Arkansas law. Ark. Stat. Ann. §41-1001. The Court also finds that the Double Jeopardy Clause prevents the state from resentencing the petitioner under that law.

PROCEDURAL ISSUES

Before discussing the merits of petitioner's double jeopardy argument, the Court must first deal with two procedural hurdles that the state argues should prevent this Court from considering the merits of the petitioner's pleading.

Wainwright

In its original response to the petitioner's claim, the state contended that the Court may not review Nelson's habeas

petition since the state court rejected his protest on the grounds that petitioner had failed to make a contemporaneous objection to the use of the questionable conviction. A prisoner may not bring a habeas claim to federal court where he did not comply with a state procedural requirement unless he is able to show that there was cause for the default and that actual prejudice resulted from the failure. *Wainwright, supra.* While *Wainwright*'s "cause and prejudice" test is intended to deny the federal habeas claim to the defendant who "sandbags" at trial in order to preserve a second chance for acquittal in a federal forum, *Id.* 97 S.Ct. at 2507-08, it is not an inflexible standard. "Cause" and "actual prejudice" are "not rigid concepts," and therefore the "victims of a fundamental miscarriage of justice" shall be able to satisfy the standard. *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 1575, 71 L.Ed.2d 783 (1982).

As the Court's earlier order indicates, petitioner here can show cause for failing to object to the use of the pardoned conviction. The Court believes that counsel's unfamiliarity with petitioner's trial record and counsel's failure to explore the issue once petitioner testified that he had been pardoned constitute "cause." It is beyond question that the petitioner himself made no deliberate decision to bypass any objection in the hopes of saving this argument for a federal forum. On the contrary, the petitioner claimed at trial that he had received a pardon and only reluctantly acquiesced in the prosecutor's statement that his sentence had been commuted after the prosecutor insisted that the petitioner was confusing a commutation of sentence with a pardon.

It is questionable whether *Wainwright* should apply at all, since the petitioner personally made every effort to allow the Court and the prosecution to clear up the questionable conviction. The petitioner effectively objected to the use of the pardoned conviction. The Court believes that the petitioner should not be penalized for his inability to distinguish the technical legal difference between a commutation and a

pardon. Under the circumstances his statement that he was pardoned was not withdrawn by a later statement on cross-examination that his sentence had been commuted. It would be understandable if the petitioner came to believe them to be the same since he had no legal education.

Ripeness

The state, by way of a letter to the Court, brings up the second procedural hurdle by arguing that the Court lacks jurisdiction to review the double jeopardy issue since the state has not yet tried to resentence the petitioner. The Court is not persuaded, however, that it must force the petitioner to be exposed to a possible resentencing before he may assert his constitutional right to be free from double jeopardy. To do so would be most unfair and would dilute this Constitutional protection which guarantees that one may not be *exposed* to the rigors and ordeal of a second trial-like proceeding. It is not just the outcome of the proceeding but the subjection to it that the Clause prevents. 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957). For this reason, courts have frequently allowed a habeas petitioner to advance his double jeopardy argument in anticipation of a resentencing. *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir., 1982). Thus, the Court finds that it may consider the merits of petitioner's double jeopardy claim.

DOUBLE JEOPARDY

The Court faces two questions on the merits of Nelson's habeas petition. The first of these concerns the matter of whether the Double Jeopardy clause of the fifth amendment of the United States Constitution, as applied to the states through the fourteenth amendment, see *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707 (1969), would ever apply to a sentencing procedure under the Arkansas Habitual Offender Act, Ark. §41-1001 et seq. If the Double Jeopardy

clause does extend to the state attempt to enhance a convicted defendant's sentence under this act, then the Court must determine whether the jury's reliance on the petitioner's pardoned conviction in this case constitutes trial error or is a matter of the sufficiency of proof. If the defect is merely reversible trial error, there is no double jeopardy and the state is free to resentence. If, on the other hand, the use of a pardoned conviction to enhance means that the jury's finding lacked a sufficient evidentiary basis, then the petitioner has been effectively acquitted on the question of enhancement, and double jeopardy would, therefore, preclude another hearing on the issue.

Application of Double Jeopardy to Sentencing

Until recently, the double jeopardy clause had never been applied to sentencing. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 2077-78, 23 L.Ed.2d 656 (1969). Thus a defendant who was convicted a second time after the original conviction has been nullified might be sentenced after the second conviction to a stiffer penalty than he had received pursuant to the overturned conviction so long as the heavier sentence is not imposed as punishment for exercising the right to appeal:

> "Long-established constitutional doctrine makes clear that, . . . the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction. . . . it has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction." *Pearce* 89 S.Ct. at 2078.

In *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), the Supreme Court carved out an exception to this traditional inapplication of double jeopardy to sentencing. Without disturbing the prior line of cases like

Pearce, the Court found that where the sentencing procedure "was itself a trial on the issue of punishment," the double jeopardy protection attaches. *Bullington* 101 S.Ct. at 1858.

The petitioner in *Bullington* had been convicted of capital murder by a Missouri jury. Before the death penalty could be imposed, Missouri law required a second hearing in front of the jury wherein the state had the burden of proving beyond a reasonable doubt the presence of certain aggravating circumstances that would warrant the imposition of the capital sentence. *Id.* at 1855. Under the statute, the defense could offer evidence of mitigation and a death verdict had to be unanimous. If the prosecution failed to obtain the death sentence, the defendant would receive a sentence of life imprisonment. Upon Bullington's conviction, the jury heard testimony from the government in its effort to obtain the death penalty. However, the jury refused to order Bullington's execution and he received a life sentence.

The trial court later set aside Bullington's conviction and ruled that he was entitled to a new trial. The state then indicated that if Bullington was convicted at retrial, it would again present evidence to support a death sentence. The defendant, claiming the protection of double jeopardy, objected and the Supreme Court agreed that since the jury had once refused to impose the death penalty, the state could not try that question again. *Id.* at 1857. While noting that ordinarily imposition of a particular sentence does not constitute an acquittal of any more severe sentence, the Court found a fundamental difference in this instance. *Id.* What set the Missouri sentencing statute apart from those to which the Supreme Court had consistently said that double jeopardy did not apply was its resemblance to the proceeding for deciding guilt or innocence:

> The procedure that resulted in the imposition of the sentence of life imprisonment upon petitioner Bullington at his first trial, however, differs significantly from those employed in any of the Court's cases where the Double Jeopardy Clause has been held inapplicable to sentencing. The jury in this case was not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute. Rather, a separate hearing was required and was held, and the jury was presented with a choice between two alternatives and standards to guide the making of that choice. Nor did the prosecution simply recommend what it felt to be an appropriate punishment. It undertook the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts. The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes.
>
> In contrast, the sentencing procedures considered in the Court's previous cases did not have the hallmarks of the trial on guilt or innocence. In *Pearce*, *Chaffin* [*v. Stynchcombe*, 412 S.Ct. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714] and *Stroud* [*v. United States*, 451 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103], there was no separate sentencing proceeding at which the prosecution was required to prove — beyond a reasonable doubt or otherwise — additional facts in order to justify the particular sentence. *Id.* at 1858.

Many of the characteristics of the Missouri statute which triggered the application of double jeopardy in *Bullington* are present in the Arkansas Habitual Offender statute. Ark. Stat. Ann. §41-1001 et seq. The latter states that a person who is convicted of a felony and has been previously convicted of a felony or felonies, "may be sentenced to an extended term of imprisonment," depending on the number of prior felony convictions. §41-1001(c). When the state seeks to

have a convicted defendant's sentence extended under the Arkansas law, it requires a separate hearing, upon the determination of guilt, wherein the prosecutor must present evidence of the prior convictions and the defense has the opportunity to rebut. Specifically, the statute states that whenever a:

> defendant is found guilty of the felony, the trial court, out of the hearing of the jury, shall hear evidence of the defendant's previous felony convictions or previous findings of the defendant's guilt of felonies and shall determine the number of prior felony convictions, if any. Defendant shall have the right to hear and controvert such evidence and to offer evidence in his support. Ark. Stat. Ann. §41-1005(2).

As with the Missouri procedure at issue in *Bullington*, and like the proceeding to determine the defendant's guilt or innocence on the predicate offense, the prosecution seeking enhancement under the Arkansas Habitual Offender's Act has the burden of proving the prior convictions beyond a reasonable doubt. Section 1003 of the Act imposes this conventional prosecutorial burden of proof:

> A previous conviction or finding of guilt of a felony may be proved by any evidence that satisfies the trial court beyond a reasonable doubt that the defendant was convicted or found guilty. Ark. Stat. Ann. §41-1003.

If the trial court finds that the government has proved any prior convictions beyond a reasonable doubt, it instructs the jury as to its findings. The jury, in turn, retires to determine whether to enhance and, if so, the appropriate sentence within the statutory range. §41-1005(3).

The Court notes that the amendments to the Arkansas Act in 1981, prior to the petitioner's trial, make no difference to the analysis of the statutory procedure under *Bullington*. Act 252,

1981 Acts of Arkansas, p. 360. Before the Arkansas General Assembly adopted the 1981 changes, the jury heard the evidence and made the determination on the question of the number of prior convictions proved by the state. As amended, the law now requires the trial court to hear the evidence and make this factual finding.[2] §41-1005. After finding the number of prior convictions which have been proved beyond a reasonable doubt, the trial court instructs the jury as to this finding. Under the former law, the jury, not the trial court, decided the factual question of how many prior convictions, if any, had been proved. Under both the former and present statute, the jury decides the proper sentence.

---

[2]Although the Act was amended on February 27, 1981, and petitioner's trial took place on March 12, 1982, it is quite clear from a review of the sentencing transcript that the state trial court labored under the mistaken belief that the old law was still in operation. The trial judge apparently did not realize that the legislature had transferred from the jury to the trial court the factual determination of the number of valid prior convictions. In the instant case, the jury heard the testimony from the only witness called, the petitioner himself, and the jury examined the documents introduced by the state in support of its claim that petitioner had four prior convictions. That the jury found the number of prior convictions is clear on the face of the verdict form given them by the court and subsequently returned by the jury: "We, the jury, find the defendant Johnny Lee Nelson guilty of the offense of burglary and theft of property of less than 100 dollars and *find that he's been convicted of four previous felonies*." (emphasis added)

If the law, as amended, had been adhered to, the court would not have given the jury the task of determining the number of prior convictions. The trial court's mistake in defining the province of the jury, however, is of no consequence at this juncture. Surely, the defendant could have asked for a new sentencing, if he had objected to the trying this question to the jury and the court had proceeded nonetheless. And it is conceivable that had the government objected to the procedure, it would have been entitled to a new sentencing had the jury not returned the verdict sought by the government. But all of this is mooted by the failure of either party to ever assert any objection.

This relatively minor adjustment to the law does not alter the important character of the proceeding. Whether the trier of fact with regard to the number of prior convictions is the jury or the court, the critical element is that the procedure still resembles a trial wherein both sides present evidence, examine and cross-examine witnesses, and the prosecution carries the burden of proof beyond a reasonable doubt.

In one respect the procedure at issue here is somewhat different from that present in *Bullington*. Namely, the jury determining Bullington's sentence had a choice between only two alternatives, execution or life imprisonment, while the jury's choice under the Arkansas enhancement statute was more flexible in that the jury had available a range of twenty to forty years that could have been imposed on Nelson once the jury decided to enhance.[3] The Supreme Court's opinion in *Bullington* does focus on the analogy between deciding guilt or innocence and deciding death or life sentence. However, this Court's reading of *Bullington* leads it to conclude that the emphasis is upon the trial-like qualities of the sentencing phase rather than the "up or down" nature of the jury's choice in *Bullington*. In both cases the state has the burden of proving some factual proposition beyond a reasonable doubt as a predicate to the jury's having discretion to impose a more serious sentence. In one case it must establish some minimum of aggravating circumstances; in the other it must establish some minimum number of convictions. If the prosecution establishes the required facts beyond a reasonable doubt, then and only then the jury decides if it wishes to enhance. If it decides to do so then, in the *Bullington* situation, it has only one option: death. In this Arkansas case the jury has a broad range of enhanced sentences it could impose. But in both

[3]The Arkansas courts have held that the state's habitual offender statute provides the jury with the option of not enhancing. *Mathis v. State*, 267 Ark. 904, 912, 591 S.W.2d 679 (1980); *Rogers v. State*, 10 Ark. App. 19, 22, 660 S.W.2d 949 (1983).

instances the jury has the prerogative to deny the requested enhancement entirely. The important consideration, in any event, is whether the enhancement procedure available under §41-1001 *et seq.* possesses all the "hallmarks of the trial on guilt or innocence." *Bullington* 101 S.Ct. at 1858. The Court concludes that it does and therefore that the rationale of *Bullington* requires the application of the Double Jeopardy Clause to those proceedings pursuant to the Arkansas Habitual Offender Act.

Double Jeopardy: Defective Proof or Trial Error

Although the Court herein finds that the proceeding by which the petitioner's sentence was enhanced was sufficiently similar to a trial for jeopardy to attach, it does not follow that the state cannot resentence the petitioner in this case. The ban on double jeopardy, for instance, does not preclude a retrial — or resentencing — where the initial proceeding contained some reversible flaw. As the Supreme Court has held, to spread double jeopardy this broadly would be costly and inconsistent with justice:

> "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible trial error in the proceedings leading to conviction." *United States v. Tateo*, 377 U.S. 463, 84 S.Ct. 1587, 1589, 12 L.Ed.2d 448 (1964)

The Double Jeopardy Clause that applies generally to enhanced sentencing pursuant to the Arkansas statute shall specifically bar resentencing in only those instances where the final outcome of the original sentencing is tantamount to an acquittal on the issue of enhancement. Thus, *Bullington* notes that Double Jeopardy cannot attach in cases where no standard of proof existed such that it could be said that the state failed to prove its case. *Bullington* 101 S.Ct. at 1860. Double Jeopardy

acts as a bar against resentencing when the sentencing procedure is essentially a "trial" in nature AND the prosecution fails to prove its case:

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. *Burks v. United States*, [437 U.S. 1] 98 S.Ct. 2141, 2147 [57 L.Ed.2d 1] (1978).

In contrast, reversal for trial error carries with it no Double Jeopardy significance since the appellate court is not, in effect, saying that the prosecution failed to prove its case. *Burks* 98 S.Ct. at 2149. Reversal for trial error

> implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect instructions, or prosecutorial misconduct. *Burks* at 2149.

[5] The question therefore is whether the use of the invalid prior conviction in the instant case was trial error or a deficiency in the proof of the prosecution's case for enhancement. Arguably, the trial court's decision to allow the introduction of the prior conviction after the defendant had initially claimed he had been pardoned constituted trial error. However, the language of the statute prescribing the procedure for enhancement belies any such claim. The question of the number of prior convictions is repeatedly and clearly made a matter of evidentiary proof within the Arkansas statute as it read at the time of petitioner's trial. Furthermore, the trial court did not intervene here. It was not called upon to rule on the validity of the conviction.

Sections 41-1001 and 41-1005 require that previous convictions be *proved*, and that the fact-finder be satisfied of

this proof beyond a reasonable doubt. Further, a separate provision sets out the means by which the prosecution may *prove* the validity of prior convictions. Ark. Stat. Ann. §41-1003. The entire chapter reveals that the question on enhancement is one of an evidentiary nature, to be proved by the state beyond a reasonable doubt.

Application of these provisions in the petitioner's sentencing procedure underscores the fact the fundamental issues involved in the brief sentencing procedure concerned matters of proof. The transcript illustrates this point. Various statements by the trial judge stress the jury's obligation to weigh the evidence presented by the government:

> THE COURT: . . . However, what we are looking for is twelve people who are fair and impartial in determining the sentence in this case. So does any juror know of any reason that if chosen to serve as a juror that he could not be absolutely fair and impartial and base his verdict strictly upon the law as given to you by the Court and the evidence that is gained from the witness stand? . . .
>
> • • • • • •
>
> THE COURT: Ladies and gentlemen, in view of the procedure that we will follow, the opening statements are waived and you gentlemen may call your first witness.

Similarly, the prosecution's introduction of documents purporting to show that the petitioner had the requisite four prior convictions indicates that the issue was one of proof:

> PROSECUTOR: Your Honor, as I understand the procedure, at this point in time the state would be entitled to put into the record certified copies of the previous commitments.
>
> THE COURT: All right.
>
> • • • • • •

PROSECUTOR: And I would offer into the record at this time, your Honor, a commitment that I have secured from the Union County Circuit Clerk which is case number CR 74-137. Proceedings were conducted July 18, 1974, and in those proceedings this defendant Johnny Lee Nelson entered a plea of guilty to the charge of burglary and grand larceny, received a 21-year sentence on each charge to run concurrent with the last ten years of each sentence suspended on good behavior. This is for a total of four separate felony convictions in Union County, all of which occurred in this court.

THE COURT: All right you may hand those to the jury and the jury may review them.

As discussed under the *Wainwright* analysis above, the petitioner personally objected to the introduction of the pardoned conviction as a basis for enhancement. Under direct examination by his attorney, the petitioner initially acknowledged that he had perhaps been convicted on four previous occasions:

DEFENSE COUNSEL: Okay now, Mr. Nelson, you also have prior convictions?

NELSON: Yes, I do.

DEFENSE COUNSEL: You've gone afoul of the law before?

NELSON: Yes, I have.

DEFENSE COUNSEL: On I guess — do you know how many occasions?

NELSON: Well it's been so long ago but I think maybe four. But it's been like I say well, twenty years or more.

A few moments later, under questioning by the prosecution, petitioner unhesitatingly stated that he had been pardoned on one of these four occasions:

NELSON: I stayed uh — well if the Jury mind me, I'd like to clear that up on that charge. This in the record it should be two charges because I see where they made a mistake. I was charged with aggravated assault and robbery which I don't know why I shouldn't be on the record but what I was charged with was on commitment where I was in the institution. But at the time I only did three years and ten months on that charge because of a pardon which I had the case investigated and the governor at the time Faubus which gave me a pardon for my sentence.

PROSECUTOR: Governor Faubus?

NELSON: Yes, sir, which at my home I have documents of that pardon on that.

And again, under redirect examination, Nelson restated his claim of the pardon:

DEFENSE COUNSEL: Mr. Nelson, you mentioned in reference to the very first conviction that you had something about a pardon. Was that not really the judge commuted that, your sentence to time served?

NELSON: No, sir. Just like I said, the time when I got that charge on that rape, assault — they had me with rape, assault and a robbery. They had the sentences you know in two sentences. I had the fourteen years and I had a seven years. But during the time I doing time, on doing time you do the smallest time first and the large time last. Well in the process I had — which my mother had, some more people had my case investigated by the F.B.I. And during that time Governor Faubus gave me a pardon on the whole thing.

DEFENSE COUNSEL: You're saying on the robbery charge?

NELSON: On the robbery and the rape charge. Of course I was sentenced to 21 years and I was doing time on the robbery charge which I was supposed to have been doing time — do the robbery charge and then start on the rape charge. But in the process of the investigation they cut the whole thing to-time served.

At this point, the prosecution should have been on notice that there were possible problems in the proof of at least one of the prior convictions. There had been no stipulation or admission with respect to the valid prior convictions and, in fact, the petitioner had vigorously claimed that one of them was pardoned. Nevertheless, instead of offering some evidence that either the petitioner was not pardoned or that his sentence was commuted, the prosecutor merely suggested that the petitioner was confused, that he had really received a commutation of his sentence:

PROSECUTOR: Your Honor, I feel compelled at this time to make a motion to strike this testimony because I think the defendant is in error. I think he's confused as to the meaning of the pardon and a commutation. Now I hesitate to allow the jury to hear this and become confused and I would ask the Court to strike the testimony. It's hearsay — would be another stated objection. I think the records are clear that are in the court and perhaps some comment by the Court to the jury could clear the matter up.

THE COURT: I think he cleared it up himself when he said it was commuted to time served. Is that what you said?

NELSON: Yes, sir.

THE COURT: Does that answer your question? It was commuted to time served. It's not a pardon. Do you agree, Mr. Keaton?

DEFENSE COUNSEL: Well that's the way it sounds to me.

THE COURT: That's what he said in this last statement.

DEFENSE COUNSEL: All right.

The Court apparently was also misled into thinking that the petitioner was mistaking a commutation for a pardon. But the prosecution could not prove the absence of a pardon beyond a reasonable doubt since, in truth, the pardon exists. Thus, there is simply a defect in the state's proof. It failed to bring forward evidence of four prior convictions which would meet the state's standards.

Perhaps one might argue that the government met its burden of proof by complying with the standards of proof set out in §41-1003. That section lists three ways of proving a prior conviction, one of which is "a certificate of the warden or other chief officer of the penal institution." §41-1003(2). At the sentencing trial, the state introduced State's Exhibit Number One, a copy of the penitentiary commitment for petitioner pursuant to the criminal charge 9078. Though the petitioner received a pardon for the conviction underlying this penitentiary commitment, a narrow and literal interpretation of §41-1003 might suggest that this commitment is all the government must show to satisfy the requirements for enhancement. But this argument proves too much and ignores the Arkansas Supreme Court's holding in *Duncan, supra*.

Given that the state court has held that pardoned convictions do not count toward enhancement, see *Duncan*, §41-1003 must be interpreted to mean that the introduction of a penitentiary commitment, or some other accepted documentation, is merely sufficient to show a conviction; it is not dispositive on the matter of enhancement, which requires valid, unpardoned convictions. Any other construction of the statute would make *Duncan* meaningless, since for every

pardoned offense the government could obtain and introduce one or more of the documents listed in §41-1003.

Similarly, the government might also contend once the government made a showing that the questioned conviction did occur, it was then incumbent upon the defendant to prove the pardon. The Court rejects this argument, concluding as a matter of law that under the Arkansas statute, the state must prove *valid* prior convictions. In *Duncan*, the Arkansas Supreme Court adopted the notion that a pardon renders the conviction a nullity. *Duncan* 254 Ark. at p. 451, 494 S.W.2d 127. Although the state court might have decided to interpret the state law differently, it firmly held that, for purposes of the enhancement statute, a conviction which has been pardoned is not a conviction. The circumstances of this case illustrate the fairness of the state court's principle and this Court shall not deviate from it. Thus, although the state places the burden upon the prosecution to show that a particular conviction was not pardoned, and petitioner here clearly stated he was pardoned,[4] and the state offered no evidence to the contrary.

The truth is that the state could not have provided any evidence to rebut the petitioner's contention because it did not exist. The Arkansas Supreme Court has clearly held that the prosecutor must carry the significant burden of ferreting out information regarding the validity of prior convictions whenever he seeks enhancement. *Roach v. State*, 255 Ark. 773, 778, 503 S.W.2d 467 (1973). It is the prosecutor who can and should check out the validity of the convictions he wishes to rely on. The state's responsibility to thoroughly investigate its claims in a criminal proceeding is always acute. And this

[4]Indeed petitioner went further stating, ". . . which at my house I have documents of that pardon on that." It would be contrary to the language and the spirit of the Arkansas statute to require the defendant to produce the pardon when the pardon records can readily be checked out in the Governor's office. More important, the state has the burden of proving statutorially satisfactory convictions.

should be especially evident to prosecutors who seek to send someone to the penitentiary for a term of 20 to 40 years on a predicate felony involving the theft of $45.00. They may ignore this incumbent obligation at the peril of their case for enhancement.

The Eighth Circuit has never faced the precise issue before the Court. The Fifth and Tenth Circuits Courts of Appeals have, however, examined similar questions regarding possible resentencing under an habitual offender statute where the initial sentence is defective. The Fifth Circuit followed the reasoning of *Burks* and *Bullington* to the conclusion that the government's failure to satisfy the requirements of the Texas enhancement statute constitutes an acquittal and therefore a second enhanced sentencing procedure would violate the Double Jeopardy Clause. *Bullard v. Estelle*, 665 F.2d 1347 (1982). *French v. Estelle*, 692 F.2d 1021 (1982); *Briggs v. Procunier*, 764 F.2d 368 (1985). The Tenth Circuit, by classifying the state's failure to show an element necessary for enhancement as a "trial error," has held that the Double Jeopardy does not bar resentencing in this context. *Linam v. Griffin*, 685 F.2d 369 (1982). The Court believes that the Fifth Circuit's line of cases is better reasoned and will follow its rationale.

In *Bullard*, the initial sentencing under the Texas procedure for enhancement was deemed invalid because the state neglected to establish that the defendant was the same person who had committed one of the prior convictions which the state offered as the basis for enhancement. *Bullard* at 1350. Since the Texas law afforded a separate proceeding for enhancement wherein the state had the burden of proving the prior offenses beyond a reasonable doubt, the court found that *Bullington* required the application of the Double Jeopardy Clause. *Id.* at 1357. The court then determined that the prosecution's failure to positively identify Bullard as the person previously convicted was a matter of the sufficiency of

the evidence and not, as the state court had found, trial error. *Id.* at 1360. As a result, the Court ruled that for Texas to get a second chance to prove the fact of defendant's prior convictions would give the state a prohibited "second bite at the apple" on the issue of enhancement. *Id.* at 1362.

Eleven months after deciding *Bullard*, the Fifth Circuit reaffirmed its holding in a similar case. *French*, supra. Like *Bullard*, and the instant case, *French* involved an invalid sentencing procedure under an habitual offender statute. There the prosecution did not introduce any evidence during the sentencing phase as to the chronology of the prior conviction. The state had merely put into evidence the dates of the defendant's two prior convictions but did not show, as Texas law required, that the defendant had committed the second felony *after* being convicted for the first. *French* at 1023. Before the defendant could be resentenced, he filed a habeas petition. The circuit court eventually held that to resentence him under the enhancement procedure for an offense on which he had already been subjected to enhancement was to put him in jeopardy twice:

> "We hold further, as required by our prior decision in *Bullard*, *supra*, that because the petitioner was once subjected to an enhancement proceeding where the state failed to produce sufficient evidence of habitual offender status to support a life sentence, the double jeopardy clause bars a second trial-like enhancement proceeding on the basis of the one prior felony insufficiently proven at the earlier trial." *Id.* at 1025.

Interestingly, the Tenth Circuit case which stands in conflict with the Fifth Circuit rationale first expressed in *Bullard* and reaffirmed in *French* involves facts that are virtually identical to those in *French*. *Linam*, supra. The prosecution in *Linam* had also failed to produce evidence regarding the dates of the commission of the prior felonies. *Id.*

at 371. The Supreme Court of New Mexico ruled that the enhancement statute required proof that subsequent offenses had occurred after conviction for the preceding felony. But the New Mexico Court remanded defendant's case for a second hearing on the habitual offender's evidence. *Id.* Upon a petition for federal habeas corpus, the United States Court of Appeals for the Tenth Circuit distinguished *Burks* by contending that the question of when the felonies were committed was merely a "formal matter." *Id.* The court concluded that the failure of the prosecutor was thus "closer to a reversal and retrial where the trial court has incorrectly excluded evidence than it is to a finding that the state had its 'one bite from the apple' and it failed to meet the burden of proof." *Linam* at 374. However, in view of the *Burks* distinction between trial errors and errors for lack of evidence, the *Linam* decision seems flawed. This Court does not believe that the *state's failure* to satisfy all of the evidentiary requirements of the statutory procedure for enhancing a convicted felon's sentence can logically be analogized to an error by the judge in excluding evidence.

Notwithstanding the Tenth Circuit's refusal to follow *Bullard*, the Fifth Circuit recently reaffirmed the holdings in *Bullard* and *French*. *Briggs* supra. In *Briggs*, the Court held that jeopardy on the punishment phase of the bifurcated Texas trial attaches once the jury is sworn for the guilt phase, even if the state subsequently dismisses the enhancement case. *Briggs* at 372.

Briggs also answered the question whether the state might salvage the original enhancement if, on resentencing, it used prior convictions other than those relied on in the initial sentencing. In *French*, the Fifth Circuit had already suggested that the state could not resentence again, if it failed once, regardless of how many other prior convictions might be available. *French* at 1025, n. 7. The circuit Court then slammed the door on this argument in *Briggs*:

> "[W]e hold that double jeopardy prevented the retrial of Briggs as a habitual offender even though the state alleged different prior felonies in its second indictment. . . . In other words, once the state has failed to prove that the defendant is a habitual offender with respect to one predicate offense, for example, the burglary here, it may not seek to sentence him as a habitual offender for that underlying crime." *Id.* at 372-73.

In the instant case, the Court finds that the evidence submitted by the state to the jury cannot support the verdict of enhancement because petitioner was in fact pardoned with respect to one of the four convictions relied upon by the state. Under Arkansas law, pardoned convictions may not be used for enhancement. *Duncan, supra.* This Court concurs with the Fifth Circuit holdings in *Bullard, French,* and *Briggs* in concluding that the nature of the defect in the initial sentencing bars the state from attempting to resentence the petitioner under the Arkansas habitual offender statute. The failure of the prosecution to introduce four valid prior convictions results in an effective acquittal on the enhancement charge. It now makes no difference that there may have been other valid prior convictions not relied upon at the initial enhancement proceeding. To expose the petitioner to a second hearing in order that the prosecution might try again to satisfy the evidentiary burden set forth in the statute would violate the constitutional prohibition against double jeopardy. Of course, the state might offer any or all of the prior convictions to enhance the sentence on some conviction other than the one upon which the previous enhancement proceeding was predicated. See *Briggs* at 373, n. 3. But having had an opportunity to provide the jury with evidence sufficient for enhancement on the vending machine theft and burglary charge, and having come up short, the state is not entitled to another opportunity to make its case on this particular conviction.

The defect in the state's evidence could have been avoided had the prosecutor researched the petitioner's record more thoroughly. This investigation would have revealed that the defendant had been pardoned with respect to one of the prior convictions upon which the prosecution sought to rely for enhancement. In any event, after the petitioner claimed in open court that the conviction had been pardoned, the prosecution was clearly put on notice that there might be some risk in relying on this conviction's validity. At this point he had another reason to check the matter out or he might have substituted one of the petitioner's other convictions, or introduced evidence of a fifth prior conviction to provide a margin of error should the questionable conviction prove defective. The government did not take these precautions, however, and the Double Jeopardy Clause of the Constitution now denies it a second opportunity to try out the issue.

Although the petitioner may not be subjected to a resentencing as an habitual offender for this predicate offense, the state may nevertheless sentence him for the underlying crime. The petitioner pled guilty to a class B felony arising out of the vending machine theft. Under Arkansas law at the time the petitioner committed this felony, a class B felony was punishable by a sentence of 5 to 20 years. Ark. Stat. Ann. §41-901. The state may therefore ask a jury to impose a sentence within this statutory range upon the petitioner. If the state chooses not to pursue a jury resentencing, the state trial court may fix the sentence at the minimum for a class B felony, which in this instance is three years. See *Richards v. State*, 254 Ark. 760, 498 S.W.2d 1 (1973).

It is therefore **ORDERED** that the petitioner be sentenced on the predicate felony under the options described above within 60 days of this order. It is further **ORDERED** that if the state fails to so resentence petitioner within said period of time, petitioner shall be released and freed from custody.

SUPREME COURT, U.S.
FILED
JAN 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

(3)

No. 87-1277

A.L. LOCKHART, Director,
Arkansas Department of Correction,

Petitioner,

v.

JOHNNY LEE NELSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JOHN WESLEY HALL, JR.
523 West Third Street
Little Rock, Arkansas 72201
(501) 371-9131

Attorney for Respondent

January 25, 1988

TABLE OF CONTENTS

Table of Authorities 1

Statement of the Case 2

Reasons Why the Writ Should be Denied 3

1. The Holding of the Eighth Circuit Below Follows *Burks* and *Bullington* and Is Correct. . 3

2. The Holding of the Eighth Circuit Follows Other Federal Appeals Courts, So This Case Does Not Justify Review in This Court. 4

Conclusion 5

Certificate of Service 6

TABLE OF AUTHORITIES

CASES:

Ex Parte Augusta, 639 S.W.2d 481 (Tex.Crim.App.1982) . . 5

Briggs v. Procunier, 764 F.2d 368 (10th Cir.1985) . . . 5

Bullington v. Missouri, 451 U.S. 430 (1981) 4,5

Bullard v. Estelle, 665 F.2d 1347 (5th Cir.1982), *vacated on other grounds* 459 U.S. 1139, *on remand* 708 F.2d 1020 (5th Cir. 1983), *habeas corpus proceeding Ex Parte Bullard*, 679 S.W.2d 12 (Tex.Crim.App.1984) 4,5

Burks v. United States, 437 U.S. 1 (1978) 3,4

French v. Estelle, 692 F.2d 102 (5th Cir.1982) 5

Nelson v. Lockhart, 641 F.Supp. 174 (E.D. Ark.1986), *affd*, 828 F.2d 446 (8th Cir.1987) 3

Nelson v. State, Ark.App. No. CACR83-160 (May 2, 1984; unpublished) 3

Nelson v. State, Ark.S.Ct. CR84-133 (Nov. 19, 1984; unpublished). 3

People v. Quintana, 634 P.2d 413 (Colo.1081) 5

People v. Sailor, 65 N.Y.2d 224, 491 N.Y.S.2d 112, 480 N.E.2d 701 (1985). 5

State v. Cullen, 646 S.W.2d 850 (Mo.App.1982). 5

State v. Hennings, 100 Wash.2d 379, 670 P.2d 256 (1983). 5

CONSTITUTIONAL PROVISIONS:

Fifth Amendment to the U.S. Constitution 3,4,5

STATUTES:

Ark.Stat.Ann. § 41-1003 4

The respondent, Johnny Lee Nelson, respectfully requests that this Court deny the petition for writ of certiorari to the Eighth Circuit in this case.

STATEMENT OF THE CASE

Respondent is a petty thief with a criminal history going back to 1960.[1] The case that brings us here is Union County Circuit Case No. CR79-22 where he was first convicted in 1980 of the felony breaking and entering into a vending machine and misdemeanor theft of property. His prior convictions required that he be sentenced as an habitual offender under Arkansas law. He was originally sentenced by a jury to 40 years on the burglary charge and one year concurrent on the theft charge. That conviction was reversed by the Arkansas Supreme Court.

Respondent came back to the Circuit Court and pled guilty to the charges but requested that a jury determine his sentence. At his sentencing trial on March 12, 1982, Nelson told his lawyer that he had been pardoned on one of the convictions that the state used against him, but his lawyer made no objection. The court and the prosecutor heard Nelson's statement to counsel on the pardoned prior but quibbled over it and decided to use it anyway. The jury thus heard of the four prior convictions, but it sentenced him only to the minimum possible with four priors: twenty years.

Respondent Nelson appealed the use of the prior pardoned conviction to enhance his sentence, but the Arkansas Court of Appeals held in an unpublished opinion that, since no objection was made by defense counsel, it could not consider the issue on appeal. It was accordingly suggested that Nelson seek post-conviction relief. *Nelson v. State*, Ark.App. No. CACR83-160 (May 2, 1984; unpublished).

Nelson petitioned the Arkansas Supreme Court for post-conviction relief, and that court held that his "bare assertion" he was pardoned was not a sufficient basis to grant relief. *Nelson v. State*, Ark.S.Ct. CR84-133 (Nov. 19, 1984; unpublished).

Nelson, all this time acting *pro se*, then sought relief in the United States District Court for the Eastern District of Arkansas. At this point, the state conceded that Nelson was pardoned on one of the convictions used against him.[2] Ultimately, the district court which granted the writ holding that the Double Jeopardy Clause of the Fifth Amendment prohibited the state from resentencing Nelson as an habitual offender. *Nelson v. Lockhart*, 641 F.Supp. 174, 178-84 (E.D. Ark.1986). The Eighth Circuit affirmed. 828 F.2d 446 (8th Cir.1987).

---

[1] Respondent's record in Union County Circuit Court is as follows:

Date	Case No.	Charge	Disposition
1-26-60	9065	Grand Larceny	1 yr.
4-5-60	9078	Assault w/i rape	14 yrs.--PARDONED
4-5-60	9090	Robbery	7 yrs.
8-31-72	11194	Poss.Stolen Prop.	18 mo. suspended
8-31-72	11213	Poss.Stolen Prop.	18 mo. suspended
7-30-73	11604	Trespassing (misd)	1 yr. suspended
8-22-74	CR74-89	Revo. in 11604 (misd)	53 days with credit for 43 days
7-25-74	CR74-137	Burg. & G.Larceny	21 years w/10 susp.
7-22-80	CR79-22	Burg. & Misd.Theft	40 years burg., 1 yr. theft--REVD
3-12-82	"	" (on remand)	20 years

The last conviction is the one at issue here.

REASONS WHY THE WRIT SHOULD BE DENIED

1. *The Holding of the Eighth Circuit Below Follows* Burks *and* Bullington *and Is Correct.*

"The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11 (1978). This rule also applies to separate sentencing proceedings,

---

[2] *See* note 3, *infra*.

too. *Bullington v. Missouri*, 451 U.S. 430 (1981); *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir.1982), *vacated on other grounds* 459 U.S. 1139, *on remand* 708 F.2d 1020 (5th Cir. 1983), *habeas corpus proceeding Ex Parte Bullard*, 679 S.W.2d 12 (Tex.Crim.App. 1984).

Under Arkansas law, prior convictions are facts to be proved beyond a reasonable doubt by the prosecution in the sentencing phase of the case. Ark.Stat.Ann. § 41-1003. The holding of the Eighth Circuit only prevents the state from retrying the sentencing phase of the case against Nelson and then mustering proof that it never presented before. There is nothing inconsistent with that result and *Burks, supra.*[3]

2. The Holding of the Eighth Circuit Follows Other Federal Appeals Courts, So This Case Does Not Justify Review in This Court.

While the petitioner cites a large number of cases seeking to show a conflict between the circuits or states, respondent submits that different cases are relevant to the inquiry here of whether resentencing violates the Fifth Amendment. The decisions from federal appeals courts are in accord.

Bullard v. Estelle, supra, 665 F.2d 1347, is virtually on all fours with this case. In *Bullard*, the jury found the facts as to both guilt and innocence and the number of priors beyond a reasonable doubt. The Fifth Circuit held that where the state was found on appeal to have failed to have proved a prior conviction, it was precluded by the Double Jeopardy Clause from proving any other prior convictions it could have proved at the trial but did not. To do so, the

[3] Respondent also notes that the state's conduct here was less than fair because the state intentionally and unjustifiedly stonewalled petitioner (with the tacit approval of the Arkansas courts) on the factual issue of his pardoned conviction at every phase of the case for three years until Chief Judge Eisele directed the state to inquire of the Arkansas Secretary of State's Office of whether, in fact, petitioner had been pardoned. That inquiry finally resulted in the resentencing order.

court reasoned, would give the state "two bites at the apple" on a question of fact, something expressly prohibited by the Double Jeopardy Clause. The court followed *Burks* and *Bullington, supra*.

That is precisely what happened here, and both courts below found *Bullard* to be persuasive authority and followed it.

Other courts litigating this same issue have come to the same conclusion: *French v. Estelle*, 692 F.2d 102 (5th Cir.1982); *Briggs v. Procunier*, 764 F.2d 368 (10th Cir. 1985); *Ex Parte Augusta*, 639 S.W.2d 481 (Tex.Crim.App. 1982); *People v. Quintana*, 634 P.2d 413, 417 & n.2, 419 (Colo.1081); *State v. Hennings*, 100 Wash.2d 379, 670 P.2d 256, 258, 261 (1983).

Cases seemingly *contra* are: *State v. Cullen*, 646 S.W.2d 850 (Mo.App.1982); *People v. Sailor*, 65 N.Y.2d 224, 491 N.Y.S.2d 112, 480 N.E.2d 701, 710 (1985).

The petition for certiorari makes this case more complicated than it really is, and the cases it cites go far beyond the facts of this case and the fact it involves a separate sentencing phase.

CONCLUSION

The net result is the three federal appeals courts have decided this precise issue, and they are all in accord. Supreme Court review is not justified, and the Petition for Writ of Certiorari to the Eighth Circuit should be denied.

Respectfully submitted,

JOHN WESLEY HALL, JR.
523 West Third Street
Little Rock, Arkansas 72201
(502) 371-9131

Attorney for Respondent

January 25, 1988

SUPREME COURT, U.S.
FILED
JAN 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

87-1277

No. 87-_____

A.L. LOCKHART, Director,
Arkansas Department of Correction,

Petitioner,

v.

JOHNNY LEE NELSON,

Respondent.

FEB - 3 1988

RESPONDENT'S MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, Johnny Lee Nelson, asks leave to file the enclosed memorandum in cpposition to the petition for writ of certiorari and to proceed in forma pauperis. Respondent has been granted leave to so proceed in both the district court and in the court of appeals. No affidavit is attached since the U.S. District Court originally appointed counsel for respondent under the Criminal Justice Act in the original proceedings before the proceedings at issue here.

Respectfully submitted,

JOHN WESLEY HALL, JR.
523 West Third Street
Little Rock, Arkansas 72201
(501) 371-9131

Attorney for Respondent

January 25, 1988

CERTIFICATE OF SERVICE

I, John Wesley Hall, Jr., swear that I have served a copy of this motion on the Attorney General of Arkansas, 201 E. Markham Street, Little Rock, Arkansas 72201 by mail this 25th day of January, 1988.

John Wesley Hall, Jr.

CERTIFICATE OF SERVICE

I, John Wesley Hall, Jr., swear that I have served a copy of this motion on the Attorney General of Arkansas, 201 E. Markham Street, Little Rock, Arkansas 72201 by mail this 26th day of January, 1988.

John Wesley Hall, Jr.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-_____

A.L. LOCKHART, Director,
Arkansas Department of Correction,

Petitioner,

v.

JOHNNY LEE NELSON,

Respondent.

RESPONDENT'S MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, Johnny Lee Nelson, asks leave to file the enclosed memorandum in opposition to the petition for writ of certiorari and to proceed in forma pauperis. Respondent has been granted leave to so proceed in both the district court and in the court of appeals. No affidavit is attached since the U.S. District Court originally appointed counsel for respondent under the Criminal Justice Act in the original proceedings before the proceedings at issue here.

Respectfully submitted,

JOHN WESLEY HALL, JR.
523 West Third Street
Little Rock, Arkansas 72201
(501) 371-9131

Attorney for Respondent

January 25, 1988

CERTIFICATE OF SERVICE

I, John Wesley Hall, Jr., swear that I have served a copy of this motion on the Attorney General of Arkansas, 201 E. Markham Street, Little Rock, Arkansas 72201 by mail this 25th day of January, 1988.

John Wesley Hall, Jr.

FILED
MAY 4 1988
JOSEPH F. SPANIOL, JR.

No. 87-1277

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

A. LOCKHART, DIRECTOR
ARKANSAS DEPT. OF CORRECTION ..... *Petitioner*

VS.

JOHNNY LEE NELSON ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

J. STEVEN CLARK, ESQ.*
Arkansas Attorney General
CLINT MILLER, ESQ.*
Assistant Attorney General
OFFICE OF ATTORNEY GENERAL
201 EAST MARKHAM ST.
HERITAGE WEST BUILDING
LITTLE ROCK, AR 72201
(501) 371-3657

JOHN WESLEY HALL, JR., ESQ.*
APPOINTED BY THIS COURT
523 WEST THIRD STREET
LITTLE ROCK, AR 72201
(501) 371-9131

*Counsel of Record

ARKANSAS LEGISLATIVE DIGEST, INC.

PETITION FOR CERTIORARI FILED ON DECEMBER 30, 1987.
CERTIORARI GRANTED ON FEBRUARY 29, 1988.

TABLE OF CONTENTS

Page

Chronological Index 1

Union County Circuit Court Penitentiary
Commitment of March 28, 1969 5

Gubernatorial Pardon of November 13, 1964 6

Respondent Nelson's Testimony at His Habitual
Offender Sentencing Hearing in Union County
Circuit Court on March 12, 1982 7

Arkansas Court of Appeals' Unpublished
Opinion of May 2, 1984 13

Arkansas Supreme Court's Unpublished
Per Curiam Opinion of November 19, 1984 15

United States District Court for the Eastern
District of Arkansas' Order of June 6, 1986 19

United States Eighth Circuit Court of Appeals'
Opinion and Judgment of September 3, 1987 19

No. 87-1277

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

A. LOCKHART, DIRECTOR
ARKANSAS DEPT. OF CORRECTION ..... *Petitioner*

VS.

JOHNNY LEE NELSON ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
Mar. 25, 1960	Respondent Nelson convicted of assault with intent to rape by a jury in Union County Circuit Court, Arkansas.
Mar. 28, 1960	Respondent Nelson sentenced to fourteen years imprisonment in the Arkansas Department of Correction by the Union County Circuit Court for his Mar. 25, 1960, conviction of assault with intent to rape.
Nov. 13, 1964	Governor Orval E. Faubus pardons respondent Nelson for his Mar. 25, 1960, Union County conviction for assault with intent to rape.

Mar. 12, 1982 — Respondent Nelson pleads guilty to burglary and theft of property charges in Union County Circuit Court and a jury sentences him to twenty years imprisonment in the Arkansas Department of Correction as an habitual offender.

May 31, 1983 — The Arkansas Supreme Court grants respondent Nelson's motion for a belated direct appeal.

May 2, 1984 — The Arkansas Court of Appeals, in an unpublished opinion, denies respondent Nelson's belated direct appeal in which he attacked the validity of his twenty-year sentence as an habitual offender.

Nov. 19, 1984 — The Arkansas Supreme Court, in an unpublished *per curiam* opinion, denies respondent Nelson's petition requesting permission to proceed in Union County Circuit Court for postconviction relief.

Jan. 25, 1985 — Respondent Nelson files a petition seeking habeas corpus relief pursuant to 28 U.S.C. §2254 in the United States District Court for the Eastern District of Arkansas with regard to his twenty-year sentence as an habitual offender imposed in Union County Circuit Court on Mar. 12, 1982.

July 8, 1985 — United States Magistrate Robert Faulkner issues a memorandum and order recommending that respondent Nelson's petition for relief pursuant to 28 U.S.C. §2254 be dismissed.

July 26, 1985 — United States District Court Judge G. Thomas Eisele, Chief Judge of the United States District Court for the Eastern District of Arkansas requests, by letter, that petitioner Lockhart's counsel determine whether respondent Nelson had, in fact, received a pardon for his Mar. 25, 1960, Union County Circuit Court conviction for assault with intent to rape.

Aug. 13, 1985 — Petitioner Lockhart files a supplemental response in which he admits that respondent Nelson had, in fact, received a pardon for his Mar. 25, 1960, conviction in Union County Circuit Court for assault with intent to commit rape.

June 6, 1986 — Judge Eisele enters an order in which he holds that former jeopardy considerations of the Fourteenth Amendment and Fifth Amendment bar respondent Nelson's resentencing in Union County Circuit Court as an habitual offender and in which he directs the State of Arkansas to resentence respondent Nelson on the charges (burglary and theft of property) underlying his sentence of Mar. 12, 1982, in Union County Circuit Court or suffer the issuance of the writ of habeas corpus to respondent Nelson pursuant to 28 U.S.C. §2254.

July 7, 1986 — Petitioner Lockhart files a notice of appeal to the United States Eighth Circuit Court of Appeals of Chief Judge Eisele's order of June 6, 1986, granting habeas corpus relief to respondent Nelson.

Sept. 3, 1987 — The United States Eighth Circuit Court of Appeals hands down an opinion and judgment affirming Chief Judge Eisele's order of June 6, 1986.

Dec. 30, 1987 — Petitioner Lockhart dockets his petition for a writ of certiorari to the United States Eighth Circuit Court of Appeals with this Court.

Feb. 29, 1988 — This Court grants petitioner Lockhart's petition for a writ of certiorari to the United States Eighth Circuit Court of Appeals.

PENITENTIARY COMMITMENT

STATE OF ARKANSAS, COUNTY OF UNION

STATE of Arkansas *vs.* Johnny Lee NELSON
Case No. 9078

In the Union Circuit Court, Proceedings March 28, 1960; Indictment for Assault with Intent to Rape

This day comes the State of Arkansas by Hon. W. I. Prewett, Prosecuting Attorney, and comes the defendant in proper person in custody of the Sheriff and by his Attorneys, T. O. Abbott and Wayne Jewell, and said defendant having been convicted of the crime of Assault with Intent to Rape on March 25th, 1960, by a Jury in this Court, and said Jury having fixed his punishment at Fourteen (14) Years in the Arkansas State Penitentiary, and this cause coming on for the pronouncement of sentence and the said Defendant having no legal reason to show why judgment and sentence should not be pronounced, the Court pronounced the following judgment and sentence, to-wit:

It is therefore considered, ordered and adjudged by the Court that said defendant be remanded into the custody of the Sheriff of Union County, and to be by him safely and speedily transported to the Penitentiary House or State Convict Farm or Camps of the State of Arkansas, and there confined at hard labor for the period of fourteen (14) years and that the State of Arkansas do have and recover of said defendant all the costs of this prosecution and have execution therefor. It is further ordered by the Court, that the Clerk of this Court make out and deliver to said Sheriff a certified copy of the foregoing judgment to be by him delivered to the Agent or Keeper of said Penitentiary as sufficient authority for him to receive and confine the said Johnny Lee Nelson in the manner aforesaid.

STATE OF ARKANSAS
EXECUTIVE DEPARTMENT

PROCLAMATION

TO ALL TO WHOM THESE PRESENTS SHALL COME . . . GREETINGS:

WHEREAS, Johnny Lee Nelson, Black Male, No. 57539, was convicted in Union County of the crime of Robbery and sentenced April 5, 1960, to a term of seven (7) years in the Arkansas State Penitentiary; and

WHEREAS, additional sentence of fourteen (14) years, being case number 9078, State of Arkansas vs. Johnny Lee Nelson, County of Union, State of Arkansas, has been imposed to be served consecutively to the above sentence; and

WHEREAS, the Board of Pardons, Paroles and Probation, and with the approval of the Court Officials, recommend that he be pardoned on this consecutive sentence for which he has not begun to serve;

NOW, THEREFORE, I, Orval E. Faubus, by virtue of the power and authority vested in me as Governor of the State of Arkansas, do hereby pardon Johnny Lee Nelson of the crime in case number 9078, State of Arkansas vs. Johnny Lee Nelson, and restore to him all rights, privileges and immunities as enjoyed before passage of this particular sentence.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed hereto the Great Seal of State in the Governor's Office, Little Rock, Arkansas, this 13th day of November, 1964.

/s/ Orval E. Faubus
GOVERNOR

[48] IN THE
CIRCUIT COURT OF UNION COUNTY, ARKANSAS
FIRST DIVISION

State of Arkansas ..... *Plaintiff*

Vs. No. CR 79-22 Burglary and Theft

Johnny Lee Nelson ..... *Defendant*

BILL OF EXCEPTIONS

Now on this day, March 12, 1982, in the Union Circuit Court in the Thirteenth Judicial Circuit, First Division, of the State of Arkansas, before the Honorable John M. Graves, the regular judge thereof, and this cause coming on to be heard, comes the Plaintiff State of Arkansas by its Deputy Prosecuting Attorney William McLean, and comes the defendant in person and by his attorney Edwin Keaton, and both parties announce ready for trial.

THEREUPON, a jury of the regular panel was duly selected, empaneled and sworn to try the issues of the fact herein, and both parties introduced the following testimony to sustain their respective issues.

• • • • •

[53] The defendant Johnny Lee Nelson presented the following testimony:

JOHNNY LEE NELSON, after being sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KEATON:

Q. State your name please.

A Johnny Lee Nelson.

. . .

[67] CROSS EXAMINATION

BY MR. McLEAN:

Q. Mr. Nelson, if these records are correct you are the same Johnny Lee Nelson that was charged with assault with intent to rape back in 1960 and was found guilty and given a fourteen-year sentence, is that correct?

A. That's correct.

Q. You were represented by Wayne Jewell and Mr. T. O. Abbott?

A. Yes, sir.

Q. Okay. Now you went to the penitentiary then I guess in March of 1960?

A. Yes, sir.

Q. Do you recall the length of time that you were required to stay?

A. I stayed uh — well if the Jury mind me, I'd like to clear that up on that charge. This in the record it should be two charges because I see where they made a mistake. I was charged with aggravated assault and robbery which I don't know why I shouldn't be on record but what I was charged with was on commitment where I was in the institution. But at the time I only did three years and ten months on that charge because of a pardon which I had the case investigated and the governor at the time Faubus which gave me a pardon for my sentence.

[T. 68]

Q. Governor Faubus?

A. Yes, sir, which at my home I have documents of that pardon on that.

Q. You did three years and ten months?

A. Yes, sir.

Q. So you were out in '64, when you got out?

A. '64 when I got out, 1964.

Q. Okay. On the charges that you were convicted of in 1972 you received the suspended sentences on, you didn't have to go to the penitentiary?

A. No, sir.

Q. Those possession — two counts of possession of stolen property?

A. Yes, sir.

Q. Okay, and then that was in '72. In 1974 July, apparently you entered a plea of guilty to burglary and grand larceny?

A. Yes, sir, I did.

Q. You received a 21-year sentence?

A. Yes, sir.

Q. So between '72 and — you had not been charged with anything between '72 and '74?

A. No, sir.

[69]

Q. How much time did you do on the '74 sentence?

A. I done 18 months.

Q. Eighteen months?

A. (Nods affirmatively.)

Q. On an 11-year —

A. Eighteen months and a few weeks.

Q. Okay. What was that the burglary of?

A. Sir?

Q. What was that burglary — what was the place that you burglarized in that case?

A. At the time I really don't know.

Q. You don't remember?

A. No, sir.

Q. Do you remember whether this was a business or a house?

A. I think it was a business. I'm not sure.

. . .

[73] REDIRECT EXAMINATION

BY MR. KEATON:

Q. Mr. Nelson, you mentioned in reference to the very first conviction that you had something about a pardon. Was that not really the judge commuted that, your sentence to time served?

A. No, sir. Just like I said, the time when I got that charge on that rape, assault — they had me with rape, assault and a robbery. They had the sentences you know in two sentences. I had the fourteen years and I had a seven years. But during the time I was doing time, on doing time you do the smallest time first and the large time last. Well in the process I had — which my mother had, some more people had my case investigated by the F.B.I. And during that time Governor Faubus gave me a pardon on the whole thing.

[74]

Q. You're saying on the robbery charge?

A. On the robbery and the rape charge. Of course I was sentenced to 21 years and I was doing time on the robbery charge which I was supposed to have been doing time — do the robbery charge and then start on the rape charge. But in the process of the investigation they cut the whole thing to time served.

MR. McLEAN: Your Honor, I feel compelled at this time to make a motion to strike this testimony because I think the defendant is in error. I think he's confused as to the meaning of the pardon and a commutation. Now I hesitate to allow the jury to hear this and become confused and I would ask the Court to strike the testimony. It's hearsay — would be another stated objection. I think the records are clear that are in the

court and perhaps some comment by the Court to the jury could clear the matter up.

THE COURT: I think he cleared it up himself when he said it was commuted to time served. Is that what you said?

DEFENDANT: Yes, sir.

[75]

THE COURT: Does that answer your question? It was commuted to time served. It's not a pardon. Do you agree, Mr. Keaton?

MR. KEATON: Well, that's the way it sounds to me.

NOT DESIGNATED FOR PUBLICATION.
SEE REVISED SUPREME COURT RULE 21.

DIVISION II
ARKANSAS COURT OF APPEALS

No. CA CR 83-150

Opinion delivered May 2, 1984.

Johnny Lee NELSON, *Appellant* vs.
STATE of Arkansas, *Appellee*

Appeal from Union Circuit Court, Hon. John M. Graves, Judge; affirmed.

MELVIN MAYFIELD, Chief Judge. At a jury trial held on March 12, 1982, the appellant pled guilty to burglary and theft of property. The jury's verdict fixed appellant's punishment at twenty years in the Arkansas Department of Correction as an habitual offender with four prior felony convictions.

Appellant's first argument on appeal is that the trial court erred in allowing the jury to consider a conviction for which appellant had received a pardon from the governor of the state. Appellant cites *Duncan v. State*, 254 Ark. 449, 494 S.W.2d 127 (1973), which held that a conviction for which the defendant had received a pardon could not be considered to enhance his sentence as an habitual offender.

There are two problems, however, with appellant's argument. In the first place, it is not clear that appellant had received a pardon. The only evidence in that regard was appellant's own testimony and it is subject to the interpretation that he received a commutation of sentence, not a pardon.

In the second place, there was no objection to the introduction of the conviction now claimed to have been pardoned. In fact, appellant took the stand and testified that he had four prior convictions. Prior to the beginning of cross-examination, the deputy prosecuting attorney stated that he had certified copies of prior convictions which he wanted to put into evidence and the court asked defense counsel, "Any objections to any of these? You are familiar with them?" The answer was, "I am. No objection." The certified copies were then introduced and it was during cross-examination that appellant volunteered the statement about a pardon. In *Washington v. State*, 276 Ark. 140, 633 S.W.2d 24 (1982), the court said, "we have held too often for any doubt to exist that in order for questions of error to be considered on appeal, they must have been raised before the trial court by timely and proper objection."

Appellant's second point is that the court erred in failing to give AMCI 7001 concerning the disputed status of a defendant as an habitual offender. Appellant contends that his testimony regarding the pardon put one of the convictions into issue and that this jury instruction should have been given. Appellant concedes, however, that no request was made for the giving of AMCI 7001 and that no objection was made to the instructions given. There is, therefore, no issue preserved for our review in this regard. *Green v. State*, 7 Ark. App. 175, 646 S.W.2d 20 (1983); *Shepherd v. State*, 270 Ark. 457, 605 S.W.2d 414 (1980).

Appellant's present counsel was not the trial attorney in this case, and there was no objection made, or question raised, during the trial about the competency or adequacy of trial counsel. Thus, any question in that regard would have to be a Rule 37 matter; it cannot be raised on direct appeal as the trial court was not given an opportunity to rule on it. *Hunter v. State*, 278 Ark. 428, 645 S.W.2d 954 (1983).

Affirmed.

CLONINGER and GLAZE, JJ., agree.

NOT DESIGNATED FOR PUBLICATION.
SEE REVISED SUPREME COURT RULE 21.

SUPREME COURT OF ARKANSAS

No. CR 84-133

Opinion delivered November 19, 1984

Johnny Lee NELSON, *Petitioner* vs.
STATE of Arkansas, *Respondent*

Pro Se Petition to proceed in Circuit Court pursuant to Arkansas Criminal Procedure Rule 37; petition denied.

PER CURIAM. Petitioner Johnny Lee Nelson pleaded guilty to burglary and theft of property. The question of a penalty was put to a jury which fixed petitioner's sentence as an habitual offender at 20 years imprisonment. The Court of Appeals affirmed the jury's decision. *Nelson v. State*, CACR 83-150 (May 2, 1984). Petitioner now seeks permission to proceed in circuit court for postconviction relief pursuant to A.R.Cr.P. Rule 37 and requests appointment of counsel. His grounds for relief encompass both the plea itself and the sentencing phase of the trial. Ordinarily the trial court first considers allegations related to a guilty plea, but we will consider the plea and the sentencing together for the sake of expediency since it is apparent without an evidentiary hearing that there are no meritorious grounds for relief.

When a guilty plea is challenged the issues are whether the plea was intelligently and voluntarily entered and whether the accused entered the plea with advice of competent counsel. *Williams v. State*, 273 Ark. 371, 620 S.W.2d 277 (1981). The appellant has the heavy burden of establishing that counsel's advice was not competent. *Cronic v. State*, ___ U.S. ___ , 104 S.Ct. 2039 (1984); *Crockett v. State*, 282 Ark. 582, 669 S.W.2d

896 (1984). Ineffective assistance of counsel with regard to a guilty plea can be shown only by pointing to specific errors by counsel. *Crockett v. State*. Alleged errors are to be evaluated under the standard enunciated in *Strickland v. Washington*, ___ U.S. ___ , 104 S.Ct. 2052 (1984).

In *Strickland*, the court held that the criterion for judging a claim of ineffectiveness is whether counsel's conduct so undermined the proper function of the adversarial process that the appellant was prejudiced and the result of the proceeding was thereby rendered unreliable. A defendant whose conviction is based on a plea of guilty ordinarily will have difficulty in proving prejudice since his plea rests on his admission in open court that he did the act with which he is charged. *Crockett v. State*.

Petitioner first alleges that counsel was ineffective for failing to demand a change of venue. Since he does not state any ground for requesting a change of venue, petitioner has failed to demonstrate that counsel was remiss. Conclusory allegations do not justify an evidentiary hearing. *Smith v. State*, 283 Ark. 264, 675 S.W.2d 627 (1984); *Blakely v. State*, 283 Ark. 138, 671 S.W.2d 183 (1984).

Petitioner also alleges, but fails to substantiate, his claims that he did not receive the sentence he expected to receive in the plea bargain, that he did not understand the plea and that he was threatened into accepting the "plea bargain arrangement." As petitioner's sentence was set by the jury and not by means of a plea agreement, the meaning of the allegation is unclear. Also, petitioner testified when the plea was entered that there had been no threats. He had the opportunity at trial to state to the court any objections he had to the sentence or the procedure whereby sentence was set.

Petitioner next asserts that he was forced to plead guilty by counsel's threats that he would receive a greater sentence if he

pleaded not guilty. Petitioner does not explain why the jury would be more likely to set a greater sentence if he pleaded not guilty and had a full trial; but in any event, fear of a more severe sentence is not sufficient basis for setting aside a plea of guilty upon advice of competent counsel which was otherwise voluntarily and knowingly entered. *See Mitchell v. State*, 271 Ark. 512, 609 S.W.2d 333 (1980).

Petitioner states he had only 15 to 20 minutes before trial was to begin to decide whether to plead guilty. He further alleges that counsel pressured him to plead guilty because counsel did not want to engage in a complete jury trial. Again, we cannot say that petitioner suffered any prejudice. He does not contend that he was not in fact guilty nor has he stated what defense was available to the charge if counsel had elected to try the case. Petitioner has clearly failed to demonstrate that any specific act by counsel rendered his plea unreliable. *Welch v. State*, 283 Ark. 281, 675 S.W.2d 641 (1984).

Finally, petitioner alleges that counsel should have objected to the introduction into evidence of proof of his prior felony conviction from 1960 on the ground that the governor had granted a pardon in that case. Petitioner attempted to raise the issue on appeal, but it was not considered because there had been no objection in the lower court.

When petitioner testified before the jury, he admitted that he had been guilty of four prior felony convictions. He said that the 1960 conviction had been pardoned, but under questioning by his counsel, he said that the length of the prison term had been reduced to the time already served. The court then had petitioner reiterate his testimony:

> Court: I think he cleared it up himself when he said it was commuted to time served. Is that what you said?
>
> Petitioner: Yes, sir.

Court: Does that answer your question? It was commuted to time served. It's not a pardon. Do you agree, Mr. Keaton [counsel for petitioner].

Mr. Keaton: Well, that's the way it sounds to me.

Petitioner has presented nothing in this petition beyond the bare assertion that there was a pardon to indicate that he was not correct in his testimony that the governor commuted the sentence but did not issue a pardon.

Petition denied.

The United States District Court for the Eastern District of Arkansas' order of June 6, 1986, granting habeas corpus relief pursuant to 28 U.S.C. §2254 can be found in the supplemental appendix to petitioner Lockhart's petition for a writ of certiorari filed with this Court.

The United States Eighth Circuit Court of Appeals' opinion and judgment of September 3, 1987, affirming the June 6, 1986, order of the United States District Court for the Eastern District of Arkansas can be found in the appendix to petitioner Lockhart's petition for a writ of certiorari filed with this Court. The Eighth Circuit's opinion appears at A-1 to A-10. The Eighth Circuit's judgment appears at A-12.

Respectfully submitted,

J. Steven Clark, Esq.*
Arkansas Attorney General
Clint Miller, Esq.*
Assistant Attorney General
Office of Attorney General
201 East Markham St.
Heritage West Building
Little Rock, AR 72201
(501) 371-3657

John Wesley Hall, Jr., Esq.*
Appointed by this Court
523 West Third Street
Little Rock, AR 72201
(501) 371-9131

*Counsel of Record

Supreme Court, U.S.
FILED
MAY 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1277

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

A. L. LOCKHART, DIRECTOR
ARKANSAS DEPT. OF CORRECTION ..... *Petitioner*

vs.

JOHNNY LEE NELSON ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

J. STEVEN CLARK, ESQ.
Arkansas Attorney General

BY: CLINT MILLER, ESQ.
Assistant Attorney General
201 EAST MARKHAM STREET
HERITAGE WEST BUILDING
LITTLE ROCK, ARKANSAS 72201
(501) 371-3657

Counsel for Petitioner

ARKANSAS LEGISLATIVE DIGEST, INC

QUESTION PRESENTED

WHETHER, IN A CRIMINAL CASE, THE FORMER JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AND THE FOURTEENTH AMENDMENT REQUIRES THAT AN APPELLATE COURT, AFTER HOLDING THAT CERTAIN EVIDENCE HAD BEEN IMPROPERLY ADMITTED AGAINST THE DEFENDANT, SHOULD DETERMINE THE SUFFICIENCY OF THE STATE'S CASE BY CONSIDERING ALL THE STATE'S PROOF THAT HAD BEEN ADMITTED INTO EVIDENCE OR BY CONSIDERING ONLY THE REMAINDER OF THE STATE'S PROOF THAT HAD BEEN PROPERLY ADMITTED INTO EVIDENCE.

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Opinions Below 1

Jurisdiction 2

Constitutional & Statutory Provisions Involved 2

Statement of the Case 3

Summary of the Argument 5

Argument 8

The former jeopardy clause of the Fifth Amendment and the Fourteenth Amendment does not require that an appellate court, in a criminal case, evaluate the sufficiency of the State's case by considering only the remainder of the State's proof after excluding that part of the State's case that consisted of inadmissible evidence.

Conclusion 19

TABLE OF AUTHORITIES

Page

Cases:

Burks v. United States, 437 U.S. 1 (1978) 5

Commonwealth v. Mattingly, 722 S.W.2d 288 (Ky. 1986) 12

Commonwealth v. Taylor, 383 Mass. 272, 418 N.E.2d 1226 (1981) 12

Greene v. Massey, 437 U.S. 19 (1978) 5

Hall v. State, 244 Ga. 86, 259 S.E.2d 41 (1979) 11

Harris v. State, 284 Ark. 247, 681 S.W.2d 334 (1984) 11

Hobbs v. Commonwealth, 655 S.W.2d 472 (Ky. 1983) ... 12

Jackson v. Virginia, 443 U.S. 307 (1979) 15

Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984) 9

Montana v. Hall, 481 U.S. ___ , 107 S.Ct. 1825, 95 L.Ed.2d 354 (1987) 10

Mulry v. State, 399 N.E.2d 413 (Ind. App. 1980) 12

People v. Harvey, 163 Cal. App. 3d 90, 208 Cal. Rptr. 910 (1985) 11

People v. Rios, 163 Cal. App. 3d 852, 210 Cal. Rptr. 271 (1985) 11

People v. Sisneros, 44 Colo. App. 65, 606 P.2d 1317 (1980) 11

TABLE OF AUTHORITIES

Page

Cases:

People v. Taylor, 76 Ill.2d 289, 391 N.E.2d 366 (1979) ... 11

Porier v. State, 662 S.W.2d 602 (Tex. Crim. App. 1984) 12

Roeder v. State, 688 S.W.2d 856 (Tex. Crim. App. 1985) 12

State v. Boone, 284 Md. 1, 393 A.2d 1361 (1978) 12

State v. Frazier, 162 W.Va. 602, 252 S.E.2d 39 (1979) 12

State v. Gray, 200 Conn. 523, 512 A.2d 217 (1986) 11

State v. Lamorie, 610 P.2d 342 (Utah 1980) 12

State v. Van Isler, 168 W.Va. 185, 283 S.E.2d 836 (1981) 12

State v. Verdine, 290 Or. 553, 624 P.2d 580 (1981) 12

State v. Wood, 596 S.W.2d 394 (Mo.), *cert. denied*, 449 U.S. 876 (1980) 12

Tibbs v. Florida, 457 U.S. 31 (1982) 11

United States v. Ball, 163 U.S. 662 (1896) 5

United States v. Bibbero, 749 F.2d 581 (9th Cir. 1984) ... 11

United States v. DiFrancesco, 449 U.S. 117 (1980) 10

United States v. Gonzalez-Sanchez, 825 F.2d 572 (1st Cir.) (1987) 11

TABLE OF AUTHORITIES

Page

Cases:

United States v. Harmon, 632 F.2d 812 (9th Cir. 1980) 11

United States v. Hodges, 770 F.2d 1475 (9th Cir. 1985) 11

United States v. Jorn, 400 U.S. 470 (1971) 10

United States v. Key, 725 F.2d 1123 (7th Cir. 1984) 11

United States v. Mandel, 591 F.2d 1347 (4th Cir.), *rev'd on other grounds*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980) 11

United States v. Marshall, 762 F.2d 419 (5th Cir. 1985) 11

United States v. Sarmiento-Perez, 667 F.2d 1239 (5th Cir.), *cert. denied*, 459 U.S. 834 (1982) 11

United States v. Tateo, 377 U.S. 463 (1964) 10

United States v. Tranowski, 702 F.2d 668 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984) 11

Webster v. Duckworth, 767 F.2d 1206 (7th Cir. 1985) 11

CONSTITUTIONAL PROVISIONS AND STATUTES:

Ark. Stat. Ann. §§41-1001—03 (Repl. 1977) 3

TABLE OF AUTHORITIES

Page

LAW REVIEW ARTICLES & TREATISES:

3 W. LaFave and J. Israel, *Criminal Procedure* §24.4 (1984) 13

Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Mich. L. Rev. 1001 (1980) 10

Westen and Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81 (1979) 11

Note, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 Uni. Chi. L. Rev. 365 (1964) 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-1277

A. L. LOCKHART, DIRECTOR
ARKANSAS DEPT. OF CORRECTION ..... *Petitioner*

vs.

JOHNNY LEE NELSON ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Eighth Circuit Court of Appeals is reported as *Lockhart v. Nelson*, 828 F.2d 446 (1987), and is reprinted in the appendix to petitioner Lockhart's petition seeking a writ of certiorari from this Court. The opinion of the United States District Court for the Eastern District of Arkansas is reported as *Nelson v. Lockhart*, 641 F.Supp. 174 (1986), and is reprinted in the supplemental appendix to petitioner Lockhart's petition seeking a writ of certiorari from this Court.

JURISDICTION

The United States Eighth Circuit Court of Appeals handed down its opinion in this case on September 3, 1987. The Court of Appeals entered its mandate in this case on November 19, 1987. On November 9, 1987, Justice Blackmun granted an extension of time until December 31, 1987, for petitioner Lockhart to file his petition seeking a writ of certiorari. Petitioner Lockhart filed his petition seeking a writ of certiorari on December 30, 1987. This Court has discretionary jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ". . .[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

On March 12, 1982, a jury in Union County, Arkansas, sentenced respondent Johnny Lee Nelson to twenty years imprisonment in the Arkansas Department of Correction. Nelson had pleaded guilty to underlying charges of burglary and theft of property and had agreed to be sentenced by a jury. Nelson was sentenced as an habitual offender pursuant to Ark. Stat. Ann. §§41-1001-03 (Repl. 1977) [currently codified with minor stylistic changes as Ark. Code Ann. §§5-4-501-02 (1987)]. The State introduced four prior convictions into evidence against Nelson. Pursuant to §41-1001(2) and §41-1003, the State had to prove beyond a reasonable doubt that Nelson had four prior felony convictions in order to make him eligible for sentencing as an habitual offender. Both the State and Nelson's trial counsel had failed to discover that Nelson had received a gubernatorial pardon for one of the prior convictions. The pardon was of great significance because pardoned prior convictions are inadmissible in Arkansas in habitual offender sentencing proceedings. *See Duncan v. State*, 254 Ark. 449, 452, 494 S.W.2d 127, 129 (1973). The trial court admitted the prior conviction that had been pardoned into evidence because Nelson's trial counsel did not know that the prior conviction had been pardoned and, therefore, did not ask the trial court to rule that it was inadmissible.

After Nelson was incarcerated in the Arkansas Department of Correction, he decided to challenge the validity of his sentence as an habitual offender. After exhausting his available state court remedies, Nelson filed a petition seeking relief pursuant to 28 U.S.C. §2254 in Federal District Court for the Eastern District of Arkansas. Lockhart moved to dismiss Nelson's petition seeking habeas corpus relief. Upon the order of the District Court, Lockhart's counsel made inquiries, discovered the existence of Nelson's pardon and supplemented Lockhart's motion to dismiss to admit the existence of a

pardon for one of the prior convictions that had been admitted into evidence against Nelson.

After learning of the existence of the pardon the District Court issued a preliminary order on September 20, 1985, in which it held that Nelson was entitled to be resentenced. The District Court appointed counsel to advise Nelson of the risk of going forward with the resentencing. Nelson's appointed counsel filed a response to a subsequent order by the District Court in which he raised the possibility that Nelson may have a Fifth and Fourteenth Amendment former jeopardy defense to any effort by the State to resentence him as an habitual offender. In response to this argument by Nelson's appointed counsel, the District Court issued an order on June 6, 1986 (published as *Nelson v. Lockhart*, 641 F.Supp. 174 [E.D. Ark. 1986]), in which the District Court held that Nelson did have a former jeopardy defense that barred any effort by the State to resentence him as an habitual offender. The Eighth Circuit Court of Appeals affirmed the District Court's order in *Lockhart v. Nelson*, 828 F.2d 446 (1987). This Court granted petitioner Lockhart's petition for a writ of certiorari on February 29, 1987.

SUMMARY OF ARGUMENT

This Court should resolve the issues posed in the instant case in light of *Burks v. United States*, 437 U.S. 1 (1978). *Burks* holds that a defendant in a criminal case has a Fifth and Fourteenth Amendment former jeopardy right not to be retried after an appellate court holds that the State's case against him was insufficient. *Burks* also holds that when an appellate court reverses for trial error, such as the incorrect receipt of evidence, the defendant has no former jeopardy bar to retrial. The instant case presents an issue left open by this Court in *Burks*' companion case, *Green v. Massey*, 437 U.S. 19 (1978): once an appellate court has concluded that a criminal defendant's conviction should be reversed because the jury received and considered inadmissible evidence, should the court consider the inadmissible evidence and the remainder of the State's proof or should the court consider only the remainder of the State's case in deciding whether the defendant has a Fifth and Fourteenth Amendment former jeopardy right not to be retried because the State failed to put sufficient evidence before the jury.

This Court has held in *United States v. Ball*, 163 U.S. 662, 672 (1896) and in its many progeny that resolution of former jeopardy issues depends upon a balancing of a criminal defendant's right not to be retried after successful challenge to his conviction on appeal against the State's right to punish criminal defendants whose guilt has been proven in a fair trial. The United States Eighth Circuit Court of Appeals erred in balancing respondent Nelson's former jeopardy right not to be resentenced as an habitual offender against Arkansas' right to punish him after proving his status as an habitual offender. The Eighth Circuit erred by excluding the part of the State's case that had been improperly admitted into evidence and by considering only the remainder of the State's case. The Eighth Circuit's approach does not give the State one fair opportunity

to muster its case for habitual offender sentencing against Nelson. The State did not have one fair opportunity to muster its case because the state trial court never ruled on the admissibility of one of Nelson's prior felony convictions and the State relied on the absence of such a ruling to its detriment. Had the state trial court been asked to rule on the admissibility of the prior felony conviction and had the trial court ruled that it was inadmissible, the State could have substituted another prior felony conviction of Nelson's in place of the one that was inadmissible. To avoid this result in the future, the State will be forced to offer every scrap of proof into evidence. Such "overtrying" of cases will greatly burden the administration of criminal justice.

The Eighth Circuit's disregard of the State's right to one fair opportunity to prove Nelson's status as an habitual offender and its focus on the prosecuting attorney's lack of preparation and his failure to make sure that the prior felony conviction at issue was admissible ignore a corollary of this Court's "trial error" holding in *Burks v. United States, supra:* incorrect receipt of evidence is usually the product of the prosecuting attorney's failure to thoroughly examine and prepare his or her case or the product of the prosecuting attorney's failure to understand the pertinent rules of evidence. *Burks* permits the State to retry a defendant and to make up for the incorrect receipt of evidence by offering substitute evidence on retrial, if such evidence is available, despite the prosecutor's having offered the inadmissible evidence to the trial court in the first place. The Eighth Circuit justifies its approach by holding that no *Burks*-type trial error occurred at respondent Nelson's state sentencing hearing because the state trial court did not explicitly rule that the evidence at issue, a prior felony conviction that had been pardoned, was admissible. This prerequisite for *Burks*-type trial error, an explicit ruling, albeit erroneous, by the trial court makes a defendant's former jeopardy right not to be retried depend on whether his trial

counsel challenged the admissibility at trial of the part of the State's case that is subsequently held on appeal to be inadmissible. The defendant has a former jeopardy bar to retrial only if his trial counsel *failed* to object to the State's evidence at issue — if the defendant's trial counsel objected and the trial court did explicitly rule, albeit erroneously, on the admissibility of the State's evidence at issue, then *Burks*-type trial error occurred and the defendant has no former jeopardy bar to retrial.

Finally, the Eighth Circuit's insistence that there can be no trial error in the absence of an explicit ruling by the trial court is contrary to this Court's teaching in *Burks* that it is the *incorrect receipt* of evidence that is trial error. Moreover, the Eighth Circuit's analytical approach is contrary to this Court's literal equation in *Burks* of an appellate court's decision that the State's proof was insufficient with a jury's verdict of acquittal. There is no doubt in this case that the jury had before it, and considered, evidence that was inadmissible in finding that respondent Nelson was an habitual offender. The equation in *Burks* of a jury's verdict with appellate review of sufficiency suggests that appellate courts, in reviewing the sufficiency of the State's case, should consider the *same* case that the jury considered and relied upon.

ARGUMENT

The instant case should be decided by this Court in light of its decision in *Burks v. United States*, 437 U.S. 1 (1978). *Burks* holds that for former jeopardy purposes an appellate court's decision that the evidence against a defendant was insufficient is the equivalent of a jury's verdict of acquittal and, therefore, bars a retrial of the defendant. *Burks* also holds that when reversible trial error, such as the incorrect receipt of evidence, occurs a defendant may be retried after successfully challenging his conviction on appeal. *Burks* at 14-5. The instant case presents an issue left open by this Court in *Burks*' companion case, *Greene v. Massey*, 437 U.S. 19, 26 n.9 (1978): once an appellate court has concluded that a criminal defendant's conviction should be reversed because the jury received and considered inadmissible evidence, should the court consider the inadmissible evidence and the remainder of the State's proof or should the court consider only the remainder of the State's case in deciding whether the defendant has a Fifth and Fourteenth Amendment former jeopardy right not to be retried because the State had failed to put sufficient evidence before the jury.[1] In the instant case the United States Eighth Circuit Court of Appeals evaluated respondent Nelson's former jeopardy claim by considering only that part of the State's case that had been properly admitted against him.

Specifically, the Eighth Circuit concluded that Nelson's Fifth and Fourteenth Amendment right not to be punished twice for the same offense barred the State from resentencing Nelson as an habitual offender because one of the four prior convictions that the jury had considered in sentencing Nelson

[1] The due process clause of the Fourteenth Amendment incorporates the Fifth Amendment's prohibition against placing a defendant twice in jeopardy. *Benton v. Maryland*, 395 U.S. 784, 793-96 (1969).

as an habitual offender was inadmissible, as a matter of state law, in habitual offender sentencing proceedings. There had been no objection at Nelson's state sentencing hearing to the admission into evidence of the inadmissible prior conviction because Nelson's trial counsel failed to realize that the prior conviction was inadmissible. (J. A. at 11-12). The Eighth Circuit held that the State's case for enhancement of Nelson's sentence as an habitual offender was insufficient because Arkansas' habitual offender sentencing statute required the State to prove the existence of at least four valid, prior felony convictions. Ark. Stat. Ann. §41-1001(2) (Repl. 1977) [currently codified with stylistic changes as Ark. Code Ann. §5-4-501(b) (1987)].[2] In order to resolve the former jeopardy issue posed in the instant case, this Court should balance Nelson's interest in the finality of the Eighth Circuit's determination that the State's habitual offender case against him was insufficient against Arkansas' interest in punishing Nelson as an habitual offender after the State has proven his status as an habitual offender beyond a reasonable doubt in a sentencing hearing that is fair to both Nelson and to Arkansas.

As a general matter, a state may retry a defendant who succeeds in overturning his conviction on appeal. *United States v. Ball*, 163 U.S. 662, 671 (1896). As this Court put the matter in *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984):

> [t]he Double Jeopardy Clause is not an absolute bar to successive trials. The general rule is that the Clause does –

[2] Petitioner Lockhart accepts as correct the Eighth Circuit's holding that this Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981), would be properly applied to habitual offender sentencing in Arkansas, given the trial-like nature of Arkansas' habitual offender sentencing process, if the State's *entire* case that was presented to the jury, and which the jury considered, were insufficient.

not bar reprosecution of a defendant whose conviction is overturned on appeal. *United States v. Ball, supra.* The justification for this rule was explained in *United States v. Tateo*, 377 U.S. 463, 466 (1964), as follows:

> "While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *Id.* at 308.

Accord Montana v. Hall, 481 U.S. ___, 107 S.Ct. 1825, 95 L.Ed.2d 354 (1987); *United States v. DiFrancesco*, 449 U.S. 117, 131 (1980); *Burks, supra* at 14-5; and *United States v. Jorn*, 400 U.S. 470, 483-84 (1971) (plurality opinion); *see generally*, Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Mich. L.Rev. 1001, 1034-40 (1980). Professor Westen writes:

> [b]ecause of its antiquity, and because its significance has until recently been masked by the fiction of waiver, the *Ball* principle is only now being recognized for what it is: the marking of a fundamental balance between a defendant's interest in finality and the state's interest in prosecution. *Ball* represents a basic assessment that even though the state is responsible for denying a defendant a fair trial the first time around, the state's interest in law enforcement is too great to justify immunizing a defendant from reprosecution.

In *Burks, supra*, this Court carved out an exception to the *Ball-Tateo* former jeopardy rule of retrial after appellate reversal; however, this Court has held that the *Burks'* exception to the *Ball-Tateo* principle is ". . . a narrow exception." *Tibbs v. Florida*, 457 U.S. 31, 39-41 (1982); *see also* Westen and Drubel, *Toward A General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 147 n.292 (1979). The *Burks* exception to the *Ball-Tateo* rule is so narrow that it does not include the Eighth Circuit's practice of evaluating the sufficiency of the State's proof by excluding the parts of the State's case that were improperly admitted into evidence and by considering only the remainder of the State's case — that part of the State's case that was properly before the jury.

Many lower court jurisdictions have decided the issue at hand contrary to the Eighth Circuit's resolution. These lower court jurisdictions are *United States v. Gonzalez-Sanchez*, 825 F.2d 572, 588 n.57 (1st Cir. 1987); *United States v. Hodges*, 770 F.2d 1475, 1477-78 (9th Cir. 1985); *Webster v. Duckworth*, 767 F.2d 1206, 1214-16 (7th Cir. 1985); *United States v. Marshall*, 762 F.2d 419, 423 (5th Cir. 1985); *United States v. Bibbero*, 749 F.2d 581, 586 n.3 (9th Cir. 1984); *United States v. Key*, 725 F.2d 1123, 1127 (7th Cir. 1984); *United States v. Tranowski*, 702 F.2d 668, 671 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984); *United States v. Sarmiento-Perez*, 667 F.2d 1239 (5th Cir.), *cert. denied*, 459 U.S. 834 (1982); *United States v. Harmon*, 632 F.2d 812 (9th Cir. 1980); *United States v. Mandel*, 591 F.2d 1347, 1373-74 (4th Cir.) *rev'd. on other grounds*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984); *People v. Rios*, 163 Cal. App. 3d 852, 870-71, 210 Cal. Rptr. 271, 283-4 (1985) and *People v. Harvey*, 163 Cal. App. 3d 90, 107-08, 208 Cal. Rptr. 910, 919-20 (1985); *People v. Sisneros*, 44 Colo. App. 65, 606 P.2d 1317 (1980); *State v. Gray*, 200 Conn. 523, 536-40, 512 A.2d 217, 225-6 (1986); *Hall v. State*, 244 Ga. 86, 93-4, 259 S.E.2d 41, 46-7 (1979); *People v. Taylor*, 76 Ill.2d 289, 309, 391 N.E.2d 366, 375

(1979); *Mulry v. State*, 399 N.E.2d 413, 419 (Ind. App. 1980); *Commonwealth v. Mattingly*, 722 S.E.2d 288 (Ky. 1986); *Hobbs v. Commonwealth*, 655 S.W.2d 472 (Ky. 1983); *State v. Boone*, 284 Md. 1, 12-8, 393 A.2d 1361, 1367-70 (1978); *Commonwealth v. Taylor*, 383 Mass. 272, 283-85, 418 N.E.2d 1226, 1233-34 (1981); *State v. Wood*, 596 S.W.2d 394 (Mo.), *cert. denied*, 449 U.S. 876 (1980); *State v. Verdine*, 290 Or. 553, 558-61, 624 P.2d 580, 583-85 (1981); *Roeder v. State*, 688 S.W.2d 856, 859-60 (Tex. Crim. App. 1985); *Porier v. State*, 662 S.W.2d 602, 605-06 (Tex. Crim. App. 1984); *State v. Lamorie*, 610 P.2d 342, 346, 347-49 (Utah 1980); *State v. Van Isler*, 168 W.Va. 185, 283 S.E.2d 836 (1981); and *State v. Frazier*, 162 W.Va. 602, 622-29, 252 S.E.2d 39, 50-3 (1979). The many lower court jurisdictions that reject the Eighth Circuit's method of separating the inadmissible evidence from the admissible and then evaluating the remaining admissible evidence do so to make sure that the State has a fair opportunity to convict the defendant. The jurisdictions that consider the State's entire case that was before the jury do so to accord the State the luxury of relying on the trial court's rulings that permit the State's evidence to go to the jury — letting the State rely on the trial court's ruling admitting the State's evidence lets the State avoid having to overtry its case by offering into evidence every scrap of proof, no matter how questionable. If these lower court jurisdictions followed the Eighth Circuit's approach, the State would be forced to "throw in the kitchen sink" to avoid reversal and dismissal because the State would never be entirely certain of how much of its case would be reviewed for sufficiency on appeal. As the Supreme Court of Missouri held in *State v. Wood*, 596 S.W.2d 394 (1980):

> [w]hen the trial court erroneously admits evidence resulting in reversal, as in the instant case, the State should not be precluded from retrial even though when such evidence is discounted there may be evidentiary insufficiency. The prosecution in proving its case is entitled to rely upon the rulings of the court and proceed

> accordingly. If the evidence offered by the State is received after challenge and is legally sufficient to establish the guilt of the accused, the State is not obligated to go further and adduce additional evidence that would be, for example, cumulative. Were it otherwise, the State, to be secure, would have to assume every ruling by the trial court on the evidence to be erroneous and marshal and offer every bit of relevant and competent evidence. The practical consequences of this would adversely affect the administration of justice, if for no other reason, by the time which would be required for preparation and trial of every case. This is consistent with *Burks v. United States, supra*, which lists among examples of trial error which do not invoke the Double Jeopardy Clause with regard to retrial, the "incorrect receipt or rejection of evidence." *Id.* at 398-99.

Accord Tranowski, supra; Harvey, supra; Boone, supra; Verdine, supra; and Note, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. Chi. L. Rev. 365, 371-72 (1964); *see* Westen, *The Three Faces of Double Jeopardy, supra*, at 1058-59 (former jeopardy does not bar retrial where the State's case is changed for the worse after the defendant's successful appeal). In its opinion, the Eighth Circuit simply ignores the "overtry" threat to future cases and focuses only on the case at hand. *See* app. to Lockhart's *cert.* pet. at A-7—A-8. In addition, Professors LaFave and Israel note that the *Wood* procedure is the better procedure. 3 W. LaFave and J. Israel, *Criminal Procedure* §24.4 n.29 (1984). Moreover, the author of the student note *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence, supra*, (cited with approval by this Court in *Burks* at 15-6) agrees with Professors LaFave and Israel that the *Wood* procedure is correct and rejects the approach taken by the Eighth Circuit. Note, *Double Jeopardy, supra*, at 371-72. As Professors LaFave and Israel observe at page 91 of 3 *Criminal*

Procedure, if the *Wood* rule is not followed, the State has not received "one fair opportunity" to make its proof. Where the State has not received "one fair opportunity" to present its case, former jeopardy considerations do not bar a retrial of the defendant. *Burks*, *supra* at 15-6. Moreover, the *Wood* procedure is consistent with *Burks'* literal equation of an appellate court's decision that the State's proof was insufficient with a jury's verdict of acquittal. In *Burks*-type cases like the instant case, the evidence found by the appellate court to be inadmissible had been before the jury and the jury, of course, had no right to find that certain pieces of evidence offered by the State were inadmissible. If an appellate court's decision that the State's evidence was not sufficient is to be a *true* equivalent of a jury's verdict of acquittal for former jeopardy purposes, then appellate courts should consider the *same* State's case that the jury considered. As the United States Fourth Circuit Court of Appeals put the matter in *United States v. Mandel*, 591 F.2d 1347 (4th Cir.), *rev'd. on other grounds*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980):

> [w]hen a conviction is reversed for trial error, however, different considerations are involved. In cases where the sufficiency of the evidence has not been questioned, no problem is presented, for the error is procedural only, although it may be of constitutional dimension. The hard question is whether an appellate court must decide the question of the sufficiency of evidence if it has been presented in a case which would have to be reversed in all events for procedural error. We are of the opinion that ordinarily an appellate court should not be required to decide that question, although we can envision the extraordinary case which might demand it. In many cases, such as the one at bar, with a vast volume of evidence, it would be doing a distinct disservice to the defendants to decide on appellate review that if a part of the evidence had been omitted the balance would be sufficient to convict. Among other things, this rather invades the province of the jury and the trial court on retrial. The jury is the proper trier of the facts, including the credibility of witnesses and the inferences to be drawn from the testimony. Perhaps the faulty evidence was the key to the jury's decision; perhaps it was not. Who can say? Certainly not a court of appeals which has neither seen the witnesses nor heard them testify. *Id.* at 1373-74.

Accord Commonwealth v. Mattingly, *supra* and *State v. Frazier*, *supra*. The Eighth Circuit argues that *Mandel* is inapplicable because the instant case does not involve a vast volume of evidence. *See* app. to Lockhart's *cert.* pet. at A-7—A-8. The Eighth Circuit fails to explain why it is that a defendant's former jeopardy rights should depend upon the fortuity of the amount of evidence the State submits. Former jeopardy rights ought not to turn on such a haphazard occurrence. Moreover, the *Wood* procedure is consistent with this Court's holding in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) that on habeas corpus review federal courts evaluating the sufficiency of the State's case against the petitioner — in order to determine whether the State proved the petitioner's guilt beyond a reasonable doubt — should review *all* of the State's evidence.

Both the Eighth Circuit and the United States District Court for the Eastern District of Arkansas ignored any concern with fairness to the State in deciding this case. Both have focused on the prosecuting attorney's failure to check the validity of the prior felony convictions that he offered into evidence against Nelson. *See* app. to Lockhart's *cert.* pet. at A-6—A-7. In essence, the Eighth Circuit held that Nelson has a former jeopardy right not to be resentenced as an habitual offender because the prosecuting attorney was poorly prepared. The Eighth Circuit's concern with the prosecuting

attorney's lack of preparation ignores the role of Nelson's counsel, who was equally unprepared. Nelson's counsel had failed to check on the validity of the State's proffered prior convictions and, therefore, he failed to make a timely objection to the introduction into evidence of the prior conviction that had been pardoned. Had Nelson's trial counsel made a proper objection to the admission into evidence of the prior conviction that had been pardoned, the trial court would have made a ruling on the admissibility of the prior conviction. Had the State been favored with a correct ruling from the trial court, it would have had a chance to make up the deficiency in its case — Nelson had at least three other prior felony convictions and any one of them could have been substituted for his prior felony conviction that had been pardoned. *See* Nelson's brief in opposition to petitioner Lockhart's petition for a writ of certiorari at page two, footnote one. Admittedly, the State was poorly prepared at Nelson's sentencing hearing, but the State's lack of preparation should not deprive it of its right to rely on correct rulings by the trial court and of its right to have an effective defense counsel assist the trial court in making a correct ruling on the admissibility of evidence. When the trial court does not rule on the admissibility of evidence because defense counsel failed to object to the admissibility of the evidence, the State has not had one *fair* opportunity to muster its case before the jury if an appellate court should subsequently decide that that part of the State's case was inadmissible. Moreover, the Eighth Circuit's preoccupation with the prosecuting attorney's lack of preparation ignores a corollary of this Court's "trial error" holding in *Burks v. United States*, *supra*: trial error, insofar as it consists of the incorrect receipt of evidence, is the product of the prosecuting attorney's lack of investigation of his or her case or is the product of the prosecuting attorney's failure to know the rules of evidence and their applicability at trial. In all cases where the incorrect receipt of evidence occurs, one could argue that the prosecuting attorney is always ultimately responsible because he or

she proffered the tainted evidence to the trial court. Moreover, as a practical matter, in all incorrect-receipt-of-evidence trial error cases the State gets a second opportunity to muster its evidence insofar as it must replace the evidence that was held on appeal to be inadmissible. *See* Westen and Drubel, *Toward A General Theory*, *supra*, at 166 n.362.

The Eighth Circuit allows itself to become obsessed with the prosecuting attorney's failure to properly prepare his case and lets itself ignore the fairness issue embodied in the *Wood* rule by the artifice of holding that no *Burks* "trial error" occurred at Nelson's habitual offender sentencing hearing in state court. According to the Eighth Circuit, no "trial error" occurred because the trial court was not asked to rule on the admissibility of the prior conviction that had been pardoned. *See* app. to Lockhart's *cert.* pet. at A-6. The Eighth Circuit's holding on this point is inconsistent with its subsequent observation that Nelson's pardoned prior felony conviction ". . .unarguably was not admissible." *See* app. to Lockhart's *cert.* pet. at A-8. There is no doubt in this case that the pardoned prior felony conviction was admitted into evidence and that the jury did consider it. How can the pardoned prior felony conviction be "not admissible" if the incorrect receipt of evidence, trial error, *did not* occur at the state sentencing hearing? The Eighth Circuit fails to explain this anomaly. The Eighth Circuit's analysis seems to suggest that appellate court rulings that evidence was inadmissible are not recognitions of trial errors, however, this Court's decision in *Burks* holds that it is the *incorrect receipt* of evidence that is trial error. *Burks* at 15.

Moreover, another anomaly inheres in the Eighth Circuit's conclusion that trial error occurs only if the trial court explicitly rules on the admissibility of the evidence at issue. In making its facile distinction between inadmissible evidence that was admitted because the trial court did not explicitly rule

on the admissibility of the evidence and inadmissible evidence that was wrongly admitted into evidence by an explicit ruling of the trial court, the Eighth Circuit fails to explain why it is that a defendant's former jeopardy right not to be retried after a verdict of acquittal should depend upon whether his counsel made an objection at trial. Presumably, had Nelson's trial counsel made an objection to the admissibility of the pardoned prior felony conviction and had defense counsel's objection been overruled then the Eighth Circuit would have found that trial error occurred and would have ordered that Nelson's habitual offender sentence be reversed and remanded. Pursuant to the Eighth Circuit's analysis, defense counsel can win a former jeopardy victory for his client on appeal by *failing* to object at trial. Unscrupulous defense counsel could lay a trap for the prosecution by intentionally withholding an objection at trial (unscrupulous counsel would be very likely to do so where the State's tainted evidence could easily be replaced) and by then falsely confessing ineffective assistance of counsel in order to reach the merits of the sufficiency issue on appeal.

Finally, the Eighth Circuit's insistence that there can be no trial error in the absence of an explicit ruling, albeit erroneous, by the trial court is contrary to this Court's teaching in *Burks* that it is the *incorrect receipt* of evidence that is trial error. This Court did not hold in *Burks* that the trial court must explicitly rule on the admissibility of the State's evidence, but held merely that trial error occurs if evidence that is before the jury creates a ". . . judicial process which is defective in some fundamental respect. . . ." *Burks* at 15. There is no doubt that Nelson's jury had before it evidence — the inadmissible prior conviction — that prejudiced Nelson in a fundamental way.

CONCLUSION

The United States Eighth Circuit Court of Appeals' holding in the instant case that respondent Nelson has a Fourteenth and Fifth Amendment former jeopardy right not to be resentenced as an habitual offender, given the facts of this case, is an incorrect interpretation of these Amendments to the United States Constitution and should be reversed by this Court. Petitioner Lockhart respectfully requests that this Court hold that respondent Nelson does not have a former jeopardy right, given the facts of this case, not to be resentenced as an habitual offender.

Respectfully submitted,

J. Steven Clark, Esq.
Arkansas Attorney General

By: Clint Miller, Esq.
Assistant Attorney General
201 East Markham Street
Heritage West Building
Little Rock, Arkansas 72201
(501) 371-3657

Counsel for Petitioner

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	5
A. Proceedings Below	5
B. Habitual Offender Sentencing in Arkansas	11
SUMMARY OF THE ARGUMENT	13
ARGUMENT	14
WHETHER "TRIAL ERROR" OR NOT, THE POSSIBLE FAILURE OF PROOF WAS KNOWN AT TRIAL. THEREFORE, DOUBLE JEOPARDY BARS THE STATE FROM TWICE SENTENCING THE RESPONDENT AS AN HABITUAL OFFENDER BECAUSE ITS USE OF A VOID CONVICTION WHICH HAD BEEN PARDONED MADE THE EVIDENCE INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE SENTENCE.	
A. Introduction	14
B. Principles Of Double Jeopardy	15
C. This Is No Mere Trial Error—It Involves A Failure Of Proof As A Matter Of Law Undertaken By The State With Knowledge Of The Consequences.	19
D. The State's Policy Argument About The Risk Of Overtrying Cases To Avoid Insufficiency Of Evidence Arguments Is Without Basis And Should Be Rejected. Moreover, Testing The Argument Proves Respondent's Point.	23
CONCLUSION	32

TABLE OF AUTHORITIES

CASES: Page

Arizona v. *Rumsey*, 467 U.S. 203 (1984) 12, 19
Benton v. *Maryland*, 395 U.S. 784 (1969) 15
Boykin v. *Alabama*, 395 U.S. 238 (1969) 5n
Briggs v. *Procurier*, 764 F.2d 368 (5th Cir. 1985) 10n
Bullard v. *Estelle*, 665 F.2d 1347 (5th Cir. 1982) 10n
Bullington v. *Missouri*, 451 U.S. 430 (1981) 9, 10, 12, 14, 16n, 18
Burgett v. *Texas*, 389 U.S. 109 (1967) 5n
Burks v. *United States*, 437 U.S. 1 (1978) 9, 12, 13, 14, 15, 16, 18, 19, 31
Chapman v. *California*, 386 U.S. 18 (1967) 29
Duncan v. *Louisiana*, 391 U.S. 145 (1968) 15
Duncan v. *State*, 254 Ark. 449, 494 S.W.2d 127 (1973) .. 8, 20
Ex parte Garland, 4 Wall. 333 (1866) 20
French v. *Estelle*, 692 F.2d 1021 (5th Cir. 1982) 10n
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 5n
Glasser v. *United States*, 315 U.S. 60 (1942) 18
Green v. *United States*, 355 U.S. 184 (1957) 15, 16
Greene v. *Massey*, 437 U.S. 19 (1978) 15, 19
Hudson v. *Louisiana*, 450 U.S. 40 (1987) 19
Hughes v. *State*, 154 Ark. 621, 243 S.W. 70 (1922) 27n
Justices of Boston Municipal Court v. *Lydon*, 466 U.S. 294 (1984) 19
Knote v. *United States*, 95 U.S. 149 (1877) 20-21
Linam v. *Griffin*, 685 F.2d 369 (10th Cir. 1982), *cert. denied*, 459 U.S. 1211 (1983) 10n
Nelson v. *Lockhart*, 828 F.2d 446 (8th Cir. 1987) 10, 11, 12, 21n
Nelson v. *Lockhart*, 641 F.Supp. 174 (E.D. Ark. 1986) 7, 8, 9, 10, 21n
Nelson v. *State*, Ark.App. No. CACR83-150 (May 2, 1984) 7
Nelson v. *State*, Ark.S.Ct. No. CR84-133 (November 19, 1984) 7
Nelson v. *State*, 274 Ark. 113, 622 S.W.2d 188 (1981) ... 6
Nichols v. *State*, 280 Ark. 173, 655 S.W.2d 450 (1983) 26, 30
Olmstead v. *United States*, 277 U.S. 438 (1928) 20
Ply v. *State*, 270 Ark. 554, 606 S.W.2d 556 (1980) 12

Table of Authorities Continued

Page

Ravellette v. *State*, 264 Ark. 344, 571 S.W.2d 433 (1978) 26, 30
Sanabria v. *United States*, 437 U.S. 54 (1978) 18
Serfass v. *United States*, 420 U.S. 377 (1975) 16
Shipp v. *State*, 241 Ark. 120, 406 S.W.2d 361 (1966) 27n
Tibbs v. *Florida*, 457 U.S. 31 (1982) 18, 19
Trans World Airlines, Inc. v. *Thurston*, 469 U.S. 111 (1985) 22n
United States v. *Gonzalez-Sanchez*, 825 F.2d 572 (1st Cir.), *cert. denied*, 108 S.Ct. 510 (1987) 24n
United States v. *Harmon*, 632 F.2d 812 (9th Cir. 1980) .. 24n
United States v. *Hasting*, 461 U.S. 499 (1983) 29
United States v. *Jorn*, 400 U.S. 470 (1971) 16
United States v. *Marshall*, 762 F.2d 419 (5th Cir. 1985) .. 24n
United States v. *New York Telephone Co.*, 434 U.S. 159 (1977) 22n
United States v. *Tateo*, 377 U.S. 463 (1964) 10, 16
United States v. *Tranowski*, 702 F.2d 668 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984) 24n
United States v. *Wilson*, 420 U.S. 332 (1975) 17
Wade v. *Hunter*, 336 U.S. 684 (1949) 17
Walker v. *State*, 240 Ark. 441, 399 S.W.2d 672 (1966) ... 26
Whitley v. *Albers*, 475 U.S. 312 (1986) 22n
In re Winship, 397 U.S. 355 (1970) 25

CONSTITUTIONAL PROVISIONS:
Fifth Amendment to the U.S. Constitution ..... *passim*
Sixth Amendment to the U.S. Constitution 30
Fourteenth Amendment to the U.S. Constitution 10
Ark.Const., Amendment 21, § 1 ..... 25n

STATUTES:
F.R.Ev. 103(a)(2) 27n
F.R.Ev. 403 ..... 27n, 29
U.R.Ev. 103(a)(2) 27n
U.R.Ev. 403 ..... 27n, 29
Ark. Code Ann. § 5-1-111 (1987) 25
Ark. Code Ann. § 5-4-103 (1987) 6n
Ark. Code Ann. § 5-4-501 (1987) 11

Table of Authorities Continued

	Page
Ark. Code Ann. § 5-4-502 (1987)	3, 12
Ark. Code Ann. § 5-4-504 (1987)	2, 27n
Ark. Code Ann. § 5-4-601 *et.seq.* (1987)	26n
Ark. Stat. Ann. § 41-110	25
Ark. Stat. Ann. § 41-802	6n
Ark. Stat. Ann. § 41-1001	1, 3, 9, 11, 11n, 28
Ark. Stat. Ann. § 41-1003	2, 9, 12, 27n
Ark. Stat. Ann. § 41-1005	3, 9, 12, 28
Ark. Stat. Ann. § 43-2328	11n
1953 Ark. Acts 228	11n
1975 Ark. Acts 280	11n
1981 Ark. Acts 252	2, 3
TREATISES AND OTHER MATERIALS:	
Annot., 90 A.L.R.3d 646 (1979)	27n
Black's Law Dictionary 498 (5th ed. 1979)	20n
3 Blackstone's Commentaries *367	20n
29 Am.Jur.2d, *Evidence* § 1 (1967)	20n
39 Am.Jur.2d, *Habitual Criminals and Subsequent Offenders* § 13 (1968)	20n
J. Hall, Trial Handbook for Arkansas Lawyers § 3.19 (1986)	26n
J. Hall, Trial Handbook for Arkansas Lawyers § 24.2 (1986)	26n
3 W. LaFave & J. Israel, Criminal Procedure § 24.4(b) (1984)	25
Note, Double Jeopardy; A New Trial After Appellate Reversal for Insufficient Evidence, 31 U.Chi.L.Rev. 365 (1970)	17
1 Wigmore on Evidence § 1 (Tillers rev. 1983)	20n
6 Wigmore on Evidence § 1907 (Chadbourn rev. 1976)	27n

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> . . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . .

The Fourteenth Amendment to the United States Constitution, § 1, provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATUTES INVOLVED

Ark. Stat. Ann. § 41-1001 (Repl. 1977) provided as follows:

> (1) A defendant who is convicted of a felony committed and who has previously been convicted of more than one (1) but less than four (4) felonies, or who has been found guilty of more than one (1) but less than four (4) felonies, may be sentenced to an extended term of imprisonment as follows:
>
> . . .
>
> (b) not less than five (5) years nor more than thirty (30) years, if the conviction is of a class B felony;
>
> . . .
>
> (2) A defendant who is convicted of a felony and who has previously been convicted of four (4) or more felonies, or who has been found guilty of four (4) or more felonies, may be sentenced to an extended term of imprisonment as follows:
>
> . . .
>
> (b) not less than twenty (20) years nor more than forty (40) years, if the conviction is of a class B felony;
>
> . . .

(3) For the purpose of determining whether a defendant has previously been convicted or found guilty of two (2) or more felonies, a conviction or finding of guilt of burglary and of the felony that was the object of the burglary shall be considered a single felony conviction or finding of guilt. A conviction or finding of guilt of an offense that was a felony under the law in effect prior to the effective date [January 1, 1976] of this Code shall be considered a previous felony conviction or finding of guilt.

Ark. Stat. Ann. § 41-1003 (Repl. 1977) provided as follows:

A previous conviction or finding of guilt of a felony may be proved by any evidence that satisfies the trier of fact beyond a reasonable doubt that the defendant was convicted or found guilty. The following are sufficient to support a finding of a prior conviction or finding of guilt:

(1) a duly certified copy of the record of a previous conviction or finding of guilt by a court of record; or

(2) a certificate of the warden or other chief officer of a penal institution of this state or of another jurisdiction, containing the name and fingerprints of the defendants, as they appear in the records of his office; or

(3) a certificate of the chief custodian of the records of the United States Department of Justice, containing the name and fingerprints of the defendant as they appear in the records of his office.

Ark. Stat. Ann. § 41-1003 (Supp. 1981) [recodified as Ark. Code Ann. § 5-4-504 (1987); the previous section as amended by 1981 Ark. Acts 252, § 1, with new matter italicized], provides as follows:

(a) A previous conviction or finding of guilt of a felony may be proved by any evidence that satisfies

the *trial court* beyond a reasonable doubt that the defendant was convicted or found guilty.

(b) The following are sufficient to support a finding of a prior conviction or finding of guilt: . . .

Ark. Stat. Ann. § 41-1005 (Repl. 1977) provided as follows:

The following procedure shall govern trials at which a sentence to an extended term of imprisonment is sought pursuant to Section 1001 [§ 41-1001]:

(1) The jury shall first hear all evidence relevant to the felony with which defendant is currently charged and shall retire to reach a verdict of guilt or innocence on this charge.

(2) If the defendant is found guilty of the felony, the same jury shall sit again and hear evidence of the defendant's previous felony convictions or previous findings of the defendant's guilt of felonies. Defendant shall have the right to hear and controvert such evidence and to offer evidence in his support.

(3) The jury shall retire again, and if it finds that the defendant has previously been convicted or found guilty of two (2) or more felonies, the jury shall consider the previous convictions or findings of guilt in determining the sentence to be imposed for the felony of which the defendant currently stands convicted.

Ark. Stat. Ann. § 41-1005 (Supp. 1981) [recodified as Ark. Code Ann. § 5-4-502 (1987); the previous section as amended by 1981 Ark. Acts 252, § 3, with new matter italicized], provides as follows:

The following procedure shall govern trials at which a sentence to an extended term of imprisonment is sought pursuant to Section 1001 [§ 41-1001]:

(1) The jury shall first hear all evidence relevant to the felony with which defendant is currently charged and shall retire to reach a verdict of guilt or innocence on this charge.

(2) If the defendant is found guilty of the felony, the *trial court, out of the hearing of the jury,* shall hear evidence of the defendant's previous felony convictions or previous findings of the defendant's guilt of felonies *and shall determine the number of prior felony convictions, if any. Defendant shall have the right to hear and controvert such evidence and to offer evidence in his support.*

(3) The trial court shall then instruct the jury as to the number of previous convictions and the statutory sentencing range. The jury may be advised as to the nature of the previous convictions and the date and place thereof. The jury shall retire again and then determine a sentence within the statutory range.

STATEMENT OF THE CASE

A. Proceedings Below

Respondent, Johnnie Lee Nelson, is a petty thief with a criminal history going back to 1960.[1] The case that brings us here is Union County, Arkansas, Circuit Court Case No. CR79-22 where he was first convicted in 1980 of the felony breaking and entering into a vending machine and misdemeanor theft of property of $45.00. His prior convictions required that he be sentenced as an habitual offender under Arkansas law. He was originally tried and sentenced by a jury to 40 years on the burglary charge

---

[1] Nelson's criminal record, all in Union County Circuit Court, is as follows:

Date	Case No.	Charge	Disposition
1-26-60	9065	Grand Larceny	1 yr.
4-5-60	9078*	Assault w/i rape	14 yrs.— PARDONED
4-5-60	9090	Robbery	7 yrs.
8-31-72	11194*	Poss. Stolen Prop.	18 mo. suspended
8-31-72	11213*	Poss. Stolen Prop.	18 mo. suspended
7-30-73	11604	Misd. Trespassing	1 yr. suspended
8-22-74	CR74-89	Revocation in 11604 (Misd)	53 days with credit for 43 days
7-25-74	CR74-137*	Burglary & G. Larceny	21 years w/10 susp.
7-22-80	CR79-22	Burglary & Misd. Theft	40 years burg., 1 yr. theft-REV'D
3-12-82	CR79-22	" (on remand)	20 years

Convictions marked with an asterisk (*) were used here to enhance the sentence. The last conviction is the proceeding at issue here.

It should be noted that the three 1960 convictions predate *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), requiring that counsel be appointed for those who cannot afford it. If the record is silent on whether counsel was present, those convictions cannot be used against him. *Burgett* v. *Texas*, 389 U.S. 109 (1967); *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

and one year concurrent on the theft charge. That conviction was reversed by the Arkansas Supreme Court. *Nelson* v. *State*, 274 Ark. 113, 622 S.W.2d 188 (1981)

Respondent's case was remanded to the Union County Circuit Court, but this time he pled guilty to the charges but requested that a jury determine his sentence.[2]

All his sentencing, Nelson told his lawyer that he had been pardoned on his 1960 assault to commit rape conviction that the state sought to use against him, but his lawyer made no objection. In fact, defense counsel erroneously agreed with the prosecutor that Nelson only obtained a commutation of that conviction.[3] The court and the prosecutor heard Nelson's statement to counsel on the pardoned prior but the prosecutor argued that Nelson was mistaken, and that he only received clemency. The court decided to permit the State to use it anyway. The jury thus heard of the four prior convictions, but was given no option for finding any lesser number. The jury sentenced Nelson only to the minimum possible sentence with four priors: twenty years.

Nelson then appealed the use of the prior pardoned conviction to enhance his sentence. In an unpublished opinion the Arkansas Court of Appeals held that since no objection was made by defense counsel, the court would

---

[2] Arkansas is only one of about five states which still use jury sentencing except where the jury is waived. Ark. Stat. Ann. § 41-802 (Repl. 1977) (recodified as § 5-4-103 (1987)).

[3] Nelson was explicit that he was pardoned on the conviction, but the prosecutor argued to the trial court that it was only a commutation by Governor Faubus and not a pardon. In a leading question, the trial court asked Nelson whether the sentence was reduced to time served. Nelson agreed with this, and the court then held that Nelson had not been pardoned. App. 11-12.

not consider the issue on appeal. (The State, of course, resisted the contention that Nelson had been pardoned.) It was accordingly suggested that Nelson seek post-conviction relief. *Nelson* v. *State*, Ark. App. No. CACR 83-150 (May 2, 1984; unpublished). App. 13.

Acting *pro se*, Nelson petitioned the Arkansas Supreme Court for post-conviction relief. That court held that his "bare assertion" he was pardoned was not a sufficient basis to grant relief. *Nelson* v. *State*, Ark. S.Ct. No. CR 84-133 (Nov. 19, 1984; unpublished). App. 15.

> Petitioner has presented nothing in this petition beyond the bare assertion that there was a pardon to indicate that he was not correct in his testimony that the governor commuted the sentence but did not issue a pardon.
>
> Petition denied.

App. at 18.

Again acting *pro se*, Nelson then sought relief in the United States District Court for the Eastern District of Arkansas by filing a petition for writ of habeas corpus on January 25, 1985 alleging, *inter alia*, that he had been pardoned on one of the priors used against him. The State responded to the petition, alleging then for the fourth time in three years that Nelson only had his sentence commuted and not pardoned. *Nelson* v. *Lockhart*, 641 F.Supp. 174, 175 (E.D. Ark. 1986).

On July 26, 1985, however, Chief U.S. District Judge Eisele wrote to the Attorney General's Office and requested that they determine whether Nelson had, in fact, been pardoned for the 1960 assault to commit rape conviction. App. 3. Eighteen days later, the State filed a supplemental pleading in response to the district court's letter, and it stated that Nelson was, in fact, pardoned. *Id.*

A copy of the pardon was filed with the district court. App. 6.

On September 20, 1985, the district court issued an order stating that Nelson's trial counsel was ineffective at Nelson's 1983 sentencing trial for not making an objection at Nelson's request on the ground Nelson had been pardoned because, under *Duncan* v. *State*, 254 Ark. 449, 494 S.W.2d 127 (1973), a pardoned conviction could not be used to enhance a sentence in habitual offender sentencing proceedings in Arkansas. Before the court would grant the writ and order resentencing which could have resulted in a longer sentence, however, counsel was appointed "to advise the petitioner of his legal rights and, in particular, to confer with him about the risks of going forward in view of the possibility that resentencing petitioner might result in his receiving a sentence of in excess of twenty years." *Nelson* v. *Lockhart*, *supra*, 641 F.Supp. at 175-76.

The district court further stated, *id.*, at 176:

> The state subsequently expressed, through a letter to the Court, its intention to resentence the petitioner. This raised the prospect that the petitioner might well receive a longer sentence than the one rendered invalid by the pardon, since petitioner had other prior felony convictions not offered or introduced at the initial sentencing, and since he had received the minimum sentence within a wide possible range. Assuming that the state would be allowed to resentence the petitioner and that the state would then introduce other prior felony convictions not introduced in the previous sentencing proceeding, his attorney counseled petitioner against pursuing the habeas claim. Counsel reported to the Court that he had so advised his client but that the petitioner nevertheless desired to continue the case. Shortly thereafter the Court issued another order in which it

> indicated that if, after conferring with his counsel again, petitioner still wished to go forward, the Court would require the petitioner to appear so that the Court could satisfy itself that the petitioner understood the possible consequences of his decision. Prior to the date of any hearing, however, petitioner's counsel brought to the Court's attention the possibility that the state might be entirely barred from resentencing the petitioner as an habitual offender upon the present conviction.
>
> Petitioner has raised a very serious issue which warrants careful re-examination of the case in light of the Double Jeopardy Clause of the Fifth Amendment. Having completed this re-examination, the Court now concludes that its earlier expressions suggesting that the state would be able to resentence the petitioner were erroneous. The Court now finds that the Writ of Habeas Corpus must be granted because the state failed to satisfy the evidentiary requirements necessary to sentence the petitioner as an habitual offender under Arkansas law. Ark. Stat. Ann. § 41-1001. The Court also finds that the Double Jeopardy Clause prevents the state from resentencing the petitioner under that law.

The district court held that the State was barred from resentencing Nelson as an habitual offender, relying on *Bullington* v. *Missouri*, 451 U.S. 430 (1981), and *Burks* v. *United States*, 437 U.S. 1 (1978), because of the trial-like qualities of the habitual sentencing procedure in Arkansas and the requirement of proof of prior convictions beyond a reasonable doubt under former Ark. Stat. Ann. §§ 41-1003 & 41-1005. *Nelson* v. *Lockhart*, *supra*, 641 F.Supp. at 178-81. The district court further held that this was no mere trial error; it was a fundamental failure of proof at trial and on appeal because the pardoned conviction was a nullity. *Id.* at 181-85. In its holding, the district

court followed Fifth Circuit cases in accord,[4] and it held that the law must treat the failure of proof at the enhancement stage as an effective acquittal on that part of the case. *Id.* at 185-86. The writ was thus granted directing the State to elect whether to resentence Nelson or accept reduction to the minimum sentence, as is the Arkansas practice. Nelson was released by the district court on bond in June 1986 pending appeal since he had already served six years and would have shortly been eligible for parole even on the 20 year sentence. (He is working and living a productive life and has not been in trouble since.)

The Eighth Circuit affirmed. *Nelson* v. *Lockhart*, 828 F.2d 446 (8th Cir. 1987). The Court of Appeals agreed with the district court that the State's failure to prove four priors because one prior had been pardoned at a separate trial on the issue of sentencing barred resentencing Nelson as an habitual offender under *Bullington* v. *Missouri*, *supra*. The Court of Appeals distinguished the line of cases holding that trial error does not invoke the protection of the Double Jeopardy Clause of the Fifth Amendment; *see*, *e.g.*, *United States* v. *Tateo*, 377 U.S. 463, 465 (1964); because, here, the State simply failed in its proof of four prior convictions. Therefore, under *Burks*, the State could not be given another opportunity to supply the missing proof. *Nelson* v. *Lockhart*, *supra*, 828 F.2d at 448. The Court of Appeals also followed the Fifth Circuit's cases. *Id.* at 450. The Court of Appeals

---

[4] *Bullard* v. *Estelle*, 665 F.2d 1347 (5th Cir. 1982); *French* v. *Estelle*, 692 F.2d 1021 (5th Cir. 1982), *vacated on other grounds* 459 U.S. 1139, *on remand* 708 F.2d 1020 (5th Cir. 1983); *Briggs* v. *Procunier*, 764 F.2d 368 (5th Cir. 1985).

Maybe *contra* was *Linam* v. *Griffin*, 685 F.2d 369 (10th Cir.(, *cert. denied*, 459 U.S. 1211 (1982) (such an error is a mere trial error in that case under state law).

followed the district court and Arkansas law and ordered Nelson's sentence reduced to the minimum of three years to remove any prejudice if the state elects not to resentence him. *Id.* at 451 n.9.

The State sought and obtained this petition for writ of certiorari.

B. Habitual Offender Sentencing In Arkansas

Under Arkansas law, as it is everywhere else, habitual offenders may be subjected to extended terms of imprisonment. Arkansas has had habitual offender sentencing since 1953, and it has used the current two-step process since 1975.[5] The first level is "more than one but less than four felonies," and it increases the maximum sentences only, in some cases fifty percent, in others less. Ark. Stat. Ann. § 41-1001(1) (Repl. 1977 & Supp. 1985) (recodified as Ark. Code Ann. § 5-4-501(a) (1987)). The second level is "four or more felonies." For habitual offenders within this category, the maximum term of imprisonment ordinarily allowable for that level of offense becomes the minimum, and the maximum is twice the maximum ordinarily allowable for the offense. Ark. Stat. Ann. § 41-1001(2) (recodified as Ark. Code Ann. § 5-4-501(b) (1987)). Thus, where a class B felony is nor-

---

[5] Arkansas' first habitual offender sentencing law was passed in 1953. 1953 Ark. Acts 228. The earlier versions of the statutes (before the 1975 Criminal Code (1975 Ark. Acts 280)) only added a fixed minimum and maximum to the possible punishment (*e.g.*, 50%). *See* Ark. Stat. Ann. § 43-2328 (Supp. 1973). The 1975 Criminal Code revision was intended to eliminate wide variations in habitual offender sentences by substantially increasing the minimum. Ark. Stat. Ann. § 41-1001 (Repl. 1977), *Commentary*. (For some reason, the 1975 Criminal Code Revision Commission's Commentaries were omitted by the publisher in the 1987 recodification.)

mally punishable by imprisonment for 5 to 20 years, an habitual offender with two or three priors is subject to imprisonment for 5 to 30 years, and an habitual offender with four or more priors can be sentenced to imprisonment for 20 to 40 years.

Habitual offender sentencing in Arkansas, as in capital cases, is bifurcated from the guilt phase. The jury determines guilt or innocence, and, if the defendant is convicted, the question of the number and nature of prior convictions is submitted to the jury for sentencing. Ark. Stat. Ann. § 41-1005 (Repl. 1977 & Supp. 1985) (recodified as Ark. Code Ann. § 5-4-502 (1987)). The prior convictions are a fact to be proved by the State beyond a reasonable doubt. Ark. Stat. Ann. § 41-1003 (Repl. 1977 & Supp. 1985) (recodified as Ark. Code Ann. § 5-4-504 (1987)); *Ply* v. *State*, 270 Ark. 554, 606 S.W.2d 556 (1980).

Juries in Arkansas are seldom given the option of finding, as with lesser included offenses, that the defendant has less than the number of priors submitted to the jury. As in this case, the jury had to find four priors and sentence him as an habitual offender or less than four priors and sentence him as a first or second offender.

As the District Court and Court of Appeals held and as the petitioner accepts (Petitioner's Brief at 9 n.2), the sentencing phase is sufficiently like a trial on fact questions that the Double Jeopardy Clause bars resentencing if the evidence is insufficient to support the verdict. *Nelson* v. *Lockhart*, *supra*, 828 F.2d at 448, relying on *Bullington* and *Burks*, *supra*). *And see Arizona* v. *Rumsey*, 467 U.S. 203 (1984) (double jeopardy bars retrial of sentencing in capital case even where the trial court made an error of law and erroneously imposed a life sentence).

SUMMARY OF THE ARGUMENT

The Court should hold that double jeopardy bars retrial when, after evidence is excluded on appeal, the prosecution would fail to convict as a matter of law on the remainder of evidence in the record. The prosecution has had its one fair opportunity to present its proof. The Court cannot consider the evidence which was excluded in evaluating the sufficiency of the evidence, particularly here when the "evidence" submitted was not evidence at all in support of the State's factual contention.

This Court has long recognized that, when there is a reversal for trial error, the government is usually free to retry the accused. If, however, the only remaining evidence that the prosecution has before the court is insufficient to support the verdict, retrial is barred because the prosecution had its "one fair opportunity to offer whatever proof it could assemble," *Burks* v. *United States*, 437 U.S. 1, 16 (1978); and it failed.

Here, the State undertook to prove a prior conviction which was pardoned and a nullity while the State was on notice that it was potentially committing error. Rather than withdraw the potential error-causing evidence, the State assumed the risk of the outcome and took the sentencing issue to conclusion.

The contention that affirmance here would require prosecutors to overtry their cases is a false issue that lacks any extrinsic support and is logically and constitutionally unsound. Prosecutors should always put their best case forward.

If the defense objects to evidence, the prosecutor and the Court are on notice the evidence is suspect. The prosecutor can put on additional evidence, if he or she has it, to cure the error and guarantee sufficiency of the

evidence on review. In close cases, additional evidence is not cumulative by definition. Also, trial judges can limit cumulative evidence. Finally, if the evidence is not there, no one is worse off by this requirement and it saves the accused an unnecessary retrial.

The State's argument here only protects lazy prosecutors. The public and the system have a right to expect that the best available case will be presented by the prosecution. Defense lawyers have to try cases all the while protecting the record. There is no reason prosecutors should not either. To reverse here would literally give the State a second chance to get the evidence it did not have before. This is precisely what the Double Jeopardy Clause was intended to prevent.

ARGUMENT

WHETHER "TRIAL ERROR" OR NOT, THE POSSIBLE FAILURE OF PROOF WAS KNOWN AT TRIAL. THEREFORE, DOUBLE JEOPARDY BARS THE STATE FROM TWICE SENTENCING THE RESPONDENT AS AN HABITUAL OFFENDER BECAUSE ITS USE OF A VOID CONVICTION WHICH HAD BEEN PARDONED MADE THE EVIDENCE INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE SENTENCE.

A. Introduction

At the outset, it is perhaps better to state what this case is and is not. The issue is not whether double jeopardy applies to the sentencing phase of habitual offenders. The State agrees that it does. Petitioner's Brief at 9 n.9; *see Bullington* v. *Missouri*, 451 U.S. 430 (1981); *Arizona* v. *Rumsey*, 467 U.S. 203 (1984). The issue here is whether the State gets another try at sentencing respondent with four or more priors because the State could not use one of the priors it did use against him because the conviction was eliminated by a pardon. Thus,

this case gives the Court the opportunity to determine the constitutional limits of a retrial under the "trial error" exception to the Double Jeopardy Clause of the Fifth Amendment where the proof remaining in the record is insufficient to convict. This issue was left open in *Greene* v. *Massey*, 437 U.S. 19, 26 n.9 (1978), which was decided with *Burks* v. *United States*, 437 U.S. 1 (1978).

The Court should now conclude that double jeopardy does, in fact, bar retrial when, after evidence is excluded on appeal, the prosecution would fail to convict as a matter of law on the remainder of evidence in the record. The prosecution has had its one fair opportunity to present its proof which was objected to. The Court cannot consider the evidence which was excluded in evaluating the sufficiency of the evidence, particularly here when the "evidence" submitted to the jury was not evidence at all in any possible support of the State's factual contention.

The well-established principles of double jeopardy in this Court's cases compel the conclusion that Nelson cannot be resentenced because the State failed in its burden of proof.

B. Principles Of Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment provides that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The protection against double jeopardy is "fundamental to the American scheme of justice." *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969) (*citing Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968)). As the Court stated in *Green* v. *United States*, 355 U.S. 184, 187-88 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and

> power should not be allowed to make repeated attempts to convict an individual of an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[6]

More recently, the court stated in *Burks* v. *United States*, *supra*, at 11:

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green* v. *United States*, 355 U.S. 184, 187 (1957); *see Serfass* v. *United States*, 420 U.S. 377, 387-388 (1975); *United States* v. *Jorn*, 400 U.S. 470, 479 (1971). (footnote omitted)

As applied to trial error, *Burks* again summarized the law in a lengthy but pertinent passage; *id.* at 15-17:

> Various rationales have been advanced to support the policy of allowing retrial to correct trial error, but in our view the most reasonable justification is that advanced by *Tateo*, *supra*, 377 U.S., at 466:
>
> It would be a high price indeed for society to pay were every accused granted immunity from

[6] This passage was quoted and relied on in *Bullington* v. *Missouri*, 451 U.S. 430, 445 (1981), in holding that the same considerations apply to sentencing.

> punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.

See Wilson, *supra*, 420 U.S. at 343, 344, n.11; *Wade* v. *Hunter*, 336 U.S. 684, 688, 689 (1949). In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. See Note, Double Jeopardy; A New Trial After Appellate Reversal for Insufficient Evidence, 31 U. Chi. L. Rev. 365, 370 (1964).

The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have been *submitted* to the jury. Since we necessarily afforded absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

The importance of a reversal on grounds of evidentiary insufficiency for purposes of inquiry under the Double Jeopardy Clause is underscored by the fact that a federal court's role in deciding whether a case

should be considered by the jury is quite limited. Even the trial court, which has heard the testimony of witnesses first hand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal. [citations omitted] The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt. [citations omitted]

Obviously a federal appellate court applies no higher a standard; rather, it must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision. *See Glasser* v. *United States*, 315 U.S. 60, 80 (1942). While this is not the appropriate occasion to re-examine in detail the standards for appellate reversal on grounds of insufficient evidence, it is apparent that such a decision will be confined to cases where the prosecution's failure is clear. Given the requirements for entry of a judgment of acquittal, the purposes of the Clause would be negated where we have to afford the government an opportunity for the proverbial "second bite at the apple." (bracketed material added; footnotes omitted; emphasis in original)

Appellate reversal of a conviction on the grounds of insufficiency of the evidence has the same effect as an acquittal: the Double Jeopardy Clause bars a retrial. *Burks* v. *United States*, *supra*, at 18. *See Tibbs* v. *Florida*, 457 U.S. 31, 41 (1982). When an accused stands acquitted of a necessary fact to support a particular sentence, retrial of the sentencing phase is barred. *Bullington* v. *Missouri*, 451 U.S. 430 (1981) (capital case). This is so even where the trial court commits an error of law that leads to an acquittal; *Sanabria* v. *United States*, 437 U.S. 54 (1978); or an erroneous finding that the highest sentence could not be imposed. *Arizona* v. *Rumsey*, 467 U.S. 203 (1984). This is also so where the trial court finds the evidence insufficient to support the conviction. *Hudson* v. *Louisiana*, 450 U.S. 40 (1987).

When there is a reversal for trial error, however, the Court recognizes that the government is usually free to retry the accused. *Greene* v. *Massey*, 437 U.S. 79, 26 (1978); *Burks*, *supra*, at 15-16; *United States* v. *Tateo*, 377 U.S. 463, 465 (1964). If, however, the only evidence the prosecution has before the appeals court is insufficient to support the verdict, retrial is barred because the prosecution had its "one fair opportunity to offer whatever proof it could assemble"; *Burks*, *supra*, at 16; and it failed. As noted by Justice Brennan in his concurrence in *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 321-22 (1984):

> [W]hen a defendant challenging his conviction on appeal contends both that the trial was infected by error and that the evidence was constitutionlly insufficient, the court may not, consistent with *Burks* v. *United States*, ignore the sufficiency claim, reverse on grounds of trial error, and remand for retrial. Because the first trial has plainly ended, "retrial is foreclosed by the Double Jeopardy Clause if the evidence fails to satisfy the [constitutional standard for sufficiency]. Hence, the [sufficiency] issue cannot be avoided; if retrial is to be had, the evidence must be found to be legally sufficient, as a matter of federal law, to sustain the jury verdict."

(*Quoting Tibbs* v. *Florida*, 457 U.S. 31, 51 (1982) (White, J. dissenting)).

C. This Is No Mere Trial Error—It Involves A Failure Of Proof As A Matter Of Law Undertaken By The State With Knowledge Of The Consequences.

The State argues, as it must, that the use of the pardoned conviction against respondent was a mere "trial

error." Thus, it argues the sufficiency of the evidence should not be considered on appeal.

1. A pardoned conviction cannot even be considered as "evidence" in Arkansas. In the cases cited in the Petitioner's Brief at 11-12, the courts there would not consider the evidence in the record without the evidence they excluded in determining the sufficiency of the evidence for retrial. In those cases, be it hearsay evidence or whatever, at least it could be argued there was "evidence" by which a fact could be proved. *Cf. Oldmstead* v. *United States*, 277 U.S. 438 (1928) (discussing what is "evidence").[7] A conviction once pardoned in Arkansas is not a conviction, so there can be no "evidence" of a valid conviction.

In the case of a pardoned prior conviction, a pardon is not "evidence" in Arkansas;[8] it is a nullity, it is nothing. The slate is wiped clean on that conviction. *Duncan* v. *State*, 254 Ark. 449, 451, 494 S.W.2d 127, 129 (1973). *Accord: Ex parte Garland*, 4 Wall. 333, 380 (1866);[9] *Knote*

---

[7] *And see* 29 Am.Jur.2d, *Evidence* § 1 (1967):

"Generally, it may be said that the term 'evidence' in the legal acceptation of the word imports the means by which any matter of fact the truth of which is submitted to investigation may be established or disproved."

See also 3 Blackstone's Commentaries *367; 1 Wigmore on Evidence § 1 (Tillers rev. 1983); Black's Law Dictionary 498 (5th ed. 1979).

[8] The jurisdictions are divided in holding that pardoned priors may or may not be used in habitual offender proceedings. This turns on a construction of the applicable statutes. *See* 39 Am.Jur.2d, *Habitual Criminals and Subsequent Offenders* § 13 (1968).

[9] "A pardon reaches both the punishment proscribed for the offense and the guilt of the offender; and, when the pardon is full, it releases the punishment and blots out of evidence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense."

v. *United States*, 95 U.S. 149, 153 (1877).

So, under the State's argument we are not to consider the sufficiency of evidence even though part of that evidence is not "evidence"? Are we supposed to pretend that the *State* made a mere "trial error" here and blink our eyes to the reality that the pardon could never be used to enhance a conviction? The trial court may have admitted the questioned evidence, but it was, after all, the State which offered it in the face of Nelson's protestations that he was pardoned. Rather than seek to prove some other conviction, the prosecutor moved unflinchingly ahead with his defective proof.[10]

---

[10] *See* the district court's opinion, 641 F.Supp. at 186:

"The defect in the state's evidence could have been avoided had the prosecutor researched the petitioner's record more thoroughly. This investigation would have revealed that the defendant had been pardoned with respect to one of the prior convictions upon which the prosecution sought to rely for enhancement. In any event, after the petitioner claimed in open court that the conviction had been pardoned, the prosecution was clearly put on notice that there might be some risk in relying on this conviction's validity. At this point he had another reason to check the matter out or he might have substituted one of the petitioner's other convictions, or introduced evidence of a fifth prior conviction to provide a margin of error should the questionable conviction prove defective. The government did not take these precautions, however, and the Double Jeopardy Clause of the Constitution now denies it a second opportunity to try out the issue."

See further the Eighth Circuit's opinion, 828 F.2d at 449-50:

"While the conviction in question was indeed submitted to the jury, Nelson had not engaged in any misconduct. For example, [he] did not deceive the court or the prosecutor as to the status of the pardoned conviction. In fact, he did all the could have been expected to do to make he court and prosecutor aware of his pardon. Responsibility for the evidence submitted remained with the prosecution." (bracketed material added)

2. The failure here transcends mere "trial error." This pardoned conviction could not and should not have been used at all. The law in Arkansas was well settled at the time. The State assumed the risk of this outcome when it went forward with its defective proof when it was on notice of the pardon rather than doing the right thing and withdrawing that conviction from the jury's consideration.

The State's cavalier attitude toward respondent's rights in this case did not end with the trial. It continued through the state appellate process and up until the time the district court directed the State to look and see if Nelson was, in fact, pardoned. This conduct was fundamentally unfair and abused the respondent and the appellate process.[11] While the prosecutor was too lazy to seek to prove another conviction or to withdraw the pardoned one, the State on appeal was too lazy to pick up the telephone or take the three-minute walk over to the Secretary of State's office to check on whether Nelson had been pardoned until Judge Eisele requested it in 1985. The State was content to rely on the fact that Nelson's "bare assertion" he was pardoned was likely going to be

[11] Respondent initially planned to cross-petition for certiorari on the issue of prosecutorial misconduct because the State spent three years denying that respondent was pardoned, unnecessarily extending his incarceration. Respondent determined, however, that this issue had necessarily been acted on by the district court, and since it was also mentioned and ruled on by the Eighth Circuit, respondent is in the position of being able to advance this argument to defend the judgment because it does not expand his relief. *Whitley* v. *Albers*, 475 U.S. 312 (1986); *Trans-World Airlines, Inc.* v. *Thurston*, 479 U.S. 111 (1985); *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977).

Since prosecutors, including the Attorney General on appeal, are immune, what other remedy does Nelson have?

insufficient to gain relief in the Arkansas appellate courts.[12]

Thus, the proof of priors was a fundamental failure of proof, and the State's conduct was fundamentally unfair. This is not just excluding evidence on appeal—if everybody had done their jobs here, Nelson simply *could not* have been proved to have four priors at his sentencing.

D. The State's Policy Argument About The Risk Of Overtrying Cases To Avoid Insufficiency Of Evidence Arguments Is Without Basis And Should Be Rejected. Moreover, Testing The Argument Proves Respondent's Point.

1. Since some courts and commentators have accepted the argument put forward by the State, one would assume there apparently is some facial appeal to the State's argument that the holding below would require the prosecution to overtry criminal cases and put on unnecessary and cumulative evidence to insure the sufficiency of the evidence on appeal should some ruling of the

[12] As all Arkansas criminal practitioners know, bare allegations of violations of rights are insufficient to obtain reversal or post-conviction relief in Arkansas. Without the pardon attached and a record reference to where it was used, the State had to know that Nelson would not prevail. All the State had to do was say that he has only generally alleged it and not proved it.

This case lays bare a fundamental flaw in how the Arkansas criminal justice system works: Form is usually more important than substance. A man in prison, obviously disadvantaged, must spend three years litigating a simple uncontroverted fact which the State assumes it has no duty to explore even though it would obviously be easier for the State to have ascertained this fact than respondent. Everybody in this case failed to do their job: defense counsel, the prosecutor, the trial judge, the appellate courts, and the Attorney General. The system woefully failed to produce a just result.

trial court admitting evidence at trial be reversed on appeal. So, as the argument goes, the prosecution would waste everyone's time and money putting on proof that trial tactics may have counseled against only to protect the sufficiency of the evidence on appeal. This would thus be prejudicial to the efficient administration of Justice. Thus, the prosecution is entitled to rely on the trial court's evidence rulings in deciding when to rest its case. In case of reversal where a key piece of evidence necessary to sustain the conviction is ruled out of evidence by the appellate court, the reversal is considered only one for "trial error," and the sufficiency of the evidence without that inadmissible evidence will not be considered.[13] This is considered by some influential commentators as "the prevailing and better view." Thus, "[i]n the language of *Burks*, the prosecution in such circumstances would not have been given 'one fair opportunity' to make its proof." 3

---

[13] *See, e.g., United States* v. *Gonzalez-Sanchez*, 825 F.2d 572, 50[illegible] n.57 (1st Cir.), *cert. denied*, 108 S.C.t. 510 (1987):

"Of course, if the evidence is insufficient without the improperly admitted evidence, the conviction must be reversed because the error of admission was necessarily prejudicial error. For purposes of determining whether the double jeopardy clause prevents a retrial, however, we must consider all the evidence that was submitted before the jury. *United States* v. *Marshall*, 762 F.2d 419, 423 (5th Cir. 1985); *United States* v. *Tranowski*, 702 F.2d 668, 671 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217, 104 S.Ct. 3586, 82 L.Ed.2d 884 (1984); *United States* v. *Harmon*, 632 F.2d 812, 814 (9th Cir. 1980). A contrary rule would force us to speculate as to what additional evidence or alternate theories the government could have brought forward had the trial court properly excluded the inadmissible evidence, *Harmon*, 632 F.2d at 814. Or, it would force the government to "overtry" its cases—to introduce all its available evidence, however redundant—to ensure that it could retry the defendant if some of its evidence is held on appeal to be inadmissible. *Tranowski*, 702 F.2d at 670."

Respondent's brief at 11-12 cites numerous other cases in accord.

W. LaFave & J. Israel, Criminal Procedure § 24.4(b), at 91 (1984). While this argument may sound good in the abstract, there is no extrinsic evidence anywhere to support it and it is logically and constitutionally unsound. It is also simply inapplicable to the realities of criminal trial practice, and it totally ignores the realities of habitual offender cases where lengthy sentences are always sought and almost always obtained.

2. Criminal trials are significant events both to the accused and to society as a whole. They are not games of blindman's bluff. This is all implicit in the double jeopardy protection. *See* Point B, *supra*. The prosecution has caused[14] an individual to be charged with a crime and has then put that person on trial and in jeopardy of being convicted and imprisoned or even executed. The case comes to trial for the purpose of deciding, as best as can be done within the confines of the rules of evidence and procedure, and despite the difficulty of evaluating the credibility of witnesses, where the truth lies, whether the defendant is guilty, and to what degree the guilty are to be punished. The prosecution of necessity puts on its best case. No less should be expected. After all, the prosecutor's duty is to convict the guilty. The prosecutor always carries the burden of proof to prove the defendant guilty beyond a reasonable doubt of all elements of the crime charged. *See, e.g.*, Ark. Code Ann. § 5-1-111 (1987) (formerly Ark. Stat. Ann. § 41-110 (Repl. 1977)); *In re Winship*, 397 U.S. 355, 364 (1970) (due process clause

---

[14] Criminal charges in Arkansas are brought by indictment or information. Ark. Const., Amendment 21, § 1 (1874). Practically all cases (over 99.9%) are filed by the prosecutor in Arkansas.

In indictment jurisdictions, the prosecutor is still the one to submit the case to the grand jury for its action.

requires proof beyond a reasonable doubt in criminal cases). No prosecutor quits proving the government's case once a mere prima facie case has been established, assuming there is other evidence, for fear of a directed verdict or acquittal. Conscientious prosecutors would put on everything they have that bears on the issue of guilt (short of unnecessary and cumulative evidence) in an effort to insure conviction and a proper sentence. Not only do they want a conviction, if justified, they want the best sentence the circumstances warrant.

As the prosecutor offers evidence in a criminal case, the defense may or may not object. Arkansas is not a plain error jurisdiction, so a specific objection is required.[15] Objections are required so the prosecution and trial court will be on notice that there is a potential problem with the evidence such that it can be cured if they choose to do so before the case is submitted to the finder of fact.[16]

At the close of the case, the defendant sometimes will move for a directed verdict to challenge the sufficiency of the evidence. This is required in Arkansas to challenge the sufficiency of the evidence on appeal. *See, e.g., Walker* v. *State*, 240 Ark. 441, 399 S.W.2d 672 (1966). If there is a prima facie case where there is sufficient evidence in the record on which the jury could conclude that each element has been proved, the motion will be denied and the case will go to the jury. *See, e.g., Nichols* v. *State* and *Ravellette* v. *State, infra*. In jury sentencing states such as Arkansas, the jury will determine guilt and sentence based on the evidence in the trial record. (In capital[17] and

[15] J. Hall, Trial Handbook for Arkansas Lawyers § 3.19, at 69 (1986).

[16] *Id.* § 24.2, at 373.

[17] Ark. Code Ann. § 5-4-601 *et seq.* (1987).

habitual offender cases[18] in Arkansas, the guilt and sentencing phases are bifurcated.)

3. The State's cumulative evidence argument must fail. If the government's case is so close that ruling one piece of evidence out can make the difference, then further evidence on that point is not cumulative by definition. Once evidence becomes cumulative, of course, it can be ruled out by the trial court.[19]

A prosecutor who withholds evidence of guilt that is not merely cumulative, as a matter of trial tactics or for any other reason, is not serving the jurisdiction he or she works for. It also flies in the face of everything we know about prosecutors. What if there are three witnesses to a crime and the prosecutor only puts on one? If the jury for some reason decides that witness is not credible, the accused may erroneously be acquitted. In addition, why would any prosecutor want to hinge a case on one witness when others are available, and then have to answer for it in closing argument? (It would be reversible error anywhere to tell the jury in summation that there was additional evidence available but not presented.[20])

This applies with equal or greater force to habitual offender sentencing. If the accused has eight prior

[18] Ark. Code Ann. § 5-4-504 (1987) (formerly Ark. Stat. Ann. § 41-1003, *supra*).

[19] Trial judges have the discretion to rule out cumulative evidence. F.R.Ev. 403; U.R.Ev. 403; 6 Wigmore on Evidence § 1907 (Chadbourn rev. 1976). If the prosecutor offers any, at least we all know it was there. The prosecutor can also make an offer of proof as to what was cumulative if it is ruled out. F.R.Ev. 103(a)(2); U.R.Ev. 103(a)(2).

[20] *See, e.g., Hughes* v. *State*, 154 Ark. 621, 243, S.W. 70 (1922); *Shipp* v. *State*, 241 Ark. 120, 406 S.W.2d 361 (1966). Cases from all other jurisdictions are collected in Annot., 90 A.L.R.3d 646 (1979).

offenses, why should a prosecutor stop with four (the highest level in Arkansas under § 41-1001)? The prosecutor can also show "the nature of the previous convictions and the date and place thereof" for the benefit of the jury under § 41-1005.[21] For example, four felony shopliftings which occurred at the same shopping center on the same date twenty years earlier may not cause a jury great consternation at sentencing if there was no other criminality. If, however, the accused has several more significant felonies since then, what rational prosecutor would not put them all into evidence so the jury would get a true picture of the criminal record of the defendant?[22] It would usually mean the difference between the minimum and the maximum sentences.[23] "Overtrying" that part of the case is simply impossible.

There is nothing wrong with requiring prosecutors to prove their best case, be it at the guilt phase or the sentencing phase. Society, our system of justice, and the requirements of the Double Jeopardy Clause should expect that from prosecutors. That is also what effective trial advocacy is all about. To argue that prosecutors

---

[21] This is the rule under both the pre- and post-1981 habitual offender sentencing systems. Under both, the jury would know exactly what the accused was previously convicted of if the parties deem it important.

[22] As an officer of the Court, respondent's counsel states that, as a deputy prosecutor and head of the career criminal division of the prosecutor's office in Little Rock in 1978-79, it was office policy to present every valid prior conviction before the jury to support a maximum possible sentence.

[23] It should be noted here that respondent got the minimum possible sentence for the four priors used against him, and the record is not clear whether any of the other two 1960 convictions can be used. It appears they cannot. *See* note 1, *supra*.

would be forced to overtry their cases is to ignore reality. If the proof is there, it should go in or at least be offered; if it is not there or is cumulative, it is not offered. If it is cumulative, surely some of the other evidence in the record will overcome the insufficiency of the evidence argument. Moreover, it is too convenient for a prosecutor to argue in an appeal that he or she would have offered other evidence if it was known that what was originally offered was inadmissible. Since that is improper trial argument, it should be improper appellate argument if there is nothing in the record to support it. *See* note 20, *supra*.

In addition, prosecutors are always put on notice, as here, that the evidence may be inadmissible by virtue of the defense objection. It is not as if the prosecutor does not know what is going on at trial and what the defense seeks to do by challenging the evidence. Trial lawyers are presumed to know the rules of evidence. When the defense objects, one would assume that a conscientious prosecutor would try to bolster the record with other evidence, if any exists, to cure error and obtain a conviction. The prosecutor may then have enough in the record that any error in admitting the challenged evidence is harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967); *United States* v. *Hasting*, 461 U.S. 499 (1983). In any event, other substantial evidence may persuade the appeals court that the trial court did not abuse its discretion in admitting the challenged evidence under F.R.Ev. 403 or U.R.Ev. 403. At the minimum, there would still be other evidence in the record to create a jury question or retrial.

Finally, one must also ask: *what other evidence?* Respondent agrees that appellate courts cannot speculate as to what additional evidence or theories the prosecution had, as the First Circuit said in *United States* v. *Gonzalez-*

Sanchez, note 13, *supra*. If there is nothing in the record which tells the appellate courts and the accused what that other purported evidence is, it is entirely proper and constitutionally required that we assume that evidence does not exist because it was not offered to begin with. Juries are not permitted to speculate; *Nichols* v. *State*, 280 Ark. 173, 655 S.W.2d 450 (1983); *Ravellette* v. *State*, 264 Ark. 344, 571 S.W.2d 433 (1978); and appellate courts should not either. To do so would violate the Double Jeopardy Clause and likely the Sixth Amendment right of confrontation by the accused as well. The prosecution would not be harmed by such a requirement. If the government had no additional evidence at trial, it is no worse off if the case is reversed. The accused is, however, because the government now has a second chance to fill the void with "new" evidence, if it can.

4. The State's argument that it should not have to overtry its cases to protect the record on appeal only serves to protect the lazy and unprepared prosecutor. After all, defense lawyers are required to protect the record for appeal or be accused of being, and maybe found, constitutionally ineffective at trial. Why do prosecutors uniformly argue, as the State's authorities obviously suggest, that they have no such obligation? This Court should hold that they *do* have such an obligation under the Double Jeopardy Clause of the Fifth Amendment. To hold otherwise would enable an unprepared prosecutor, with the help of an overly protective trial judge, to, for example, introduce a piece of obviously inadmissible evidence in order to at least get a case to the jury, even though everybody knows the case will likely be reversed on appeal, and then cure the evidentiary insufficiency on retrial. In that situation, the prosecutor "has been given one fair opportunity to offer whatever proof it could assemble"; *Burks* v. *United States*, *supra*, 437 U.S. at 16; and retrial would, in fact, violate the Double Jeopardy Clause.

It is pure fiction to argue as do LaFave and Israel, *supra*, that the prosecutor has been denied that "one fair opportunity" when he or she relies on the trial court's rulings or defense counsel's ineffectiveness. When the trial begins, the prosecutor announces "Ready for trial," and he or she is expected to put on the best case possible. That is the essence of the government's "one fair opportunity to offer whatever proof it could assemble." And if that evidence is not enough for a jury, a trial judge or an appellate court, the Double Jeopardy Clause will bar a retrial.

What the State clearly is asking for is a "second bite at the apple." It had its first bite in 1982. It could have called the Circuit Clerk on short notice to fill the potential void in its proof of prior convictions if it could, but it chose not to. It could have withdrawn the defective conviction, but it did not do so. Now it asks for what is nothing but a "second fair opportunity to offer whatever proof it could assemble." That is exactly what the Double Jeopardy Clause was intended to prohibit.[24]

---

[24] One other matter deserves note: Resentencing Nelson as with more than one prior conviction is not before the Court. The jury that sentenced Nelson was not given the option of finding whether he had any number of priors less than four other then to acquit him outright for failure to prove priors (T. 77-78), and neither side has ever requested "lesser included offense" treatment. On this state of the record, the only alternative the jury had, if this prior were known to be invalid at trial, *would have been to acquit him*. Therefore, Nelson may not be sentenced at all.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JOHN WESLEY HALL, JR.
523 West Third Street
Little Rock, Arkansas 72201
(501) 371-9131
Attorney for Respondent
Appointed by the Court

Supreme Court, U.S.
FILED
JUN 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1277

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

A. L. LOCKHART, DIRECTOR
ARKANSAS DEPT. OF CORRECTION ..... *Petitioner*

VS.

JOHNNY LEE NELSON ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

JOHN STEVEN CLARK, ESQ.
Arkansas Attorney General

BY: CLINT MILLER, ESQ.
Assistant Attorney General
200 TOWER BUILDING
4TH & CENTER STREETS
LITTLE ROCK, ARKANSAS 72201
(501) 682-3657

Counsel for Petitioner

ARKANSAS LEGISLATIVE DIGEST, INC.

TABLE OF CONTENTS

Page

Table of Authorities ii

A. "WHAT ALL ARKANSAS CRIMINAL PRACTITIONERS KNOW" 1

B. WHETHER TRIAL ERROR OCCURRED 2

C. WHETHER PROSECUTING ATTORNEYS WILL OVERTRY CASES 3

D. WHETHER APPELLATE COURTS SHOULD CONSIDER ALL OF THE STATE'S EVIDENCE 5

Conclusion 6

TABLE OF AUTHORITIES

Page

CASES:

Burks v. United States, 437 U.S. 1 (1978) 4

Hunter v. State, 257 Ga. 571, 361 S.E.2d 787 (1978) 5

Kuhlmann v. Wilson, 477 U.S. ___ , 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986) 5

Morris v. Slappy, 461 U.S. 1 (1983) 2

Tumbs v. State, 290 Ark. 214, 718 S.W.2d 105 (1986) 3

United States v. Holzer, 840 F.2d 1343 (7th Cir. 1988) 4

United States v. Royer, 268 U.S. 394 (1925) 2

Webster v. Duckworth, 767 F.2d 1206 (7th Cir. 1985).....5

Webster v. State, 274 Ind. 668, 413 N.E.2d 898 (1980).....5

LAW REVIEW ARTICLES & TREATISES:

1 J. Wigmore, *Evidence in Trials at Common Law* §1 (Tillers rev. ed. 1983).....3

21 C.J.S. *Court* §146 (1940) 3

8 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §§3759-62 (rev. perm. ed. 1982) 2

Note, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. Chi. L. Rev. 365 (1964) 5

Westen and Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81 (1979).....4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-1277

A. L. LOCKHART, DIRECTOR
ARKANSAS DEPT. OF CORRECTION .....*Petitioner*

vs.

JOHNNY LEE NELSON.....*Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

On June 27, 1988, respondent Nelson filed his brief on the merits in the above-styled case. Petitioner Lockhart wishes to reply to Nelson's brief.

A. "WHAT ALL ARKANSAS CRIMINAL PRACTITIONERS KNOW"

Subsection C of Nelson's brief contains the following assertions of opinion: (1) the prosecuting attorney who represented the state of Arkansas at Nelson's sentencing hearing in Union County Circuit Court was so lazy that an unjust result occurred; (2) the Attorney General's Office, which represented the state of Arkansas in this case on direct appeal and at the post-conviction level, was so lazy that an unjust result occurred; and (3) the criminal justice system in Arkansas usually elevates form over substance. Petitioner Lockhart submits that these insulting *ad hominen* remarks are gratuitous and inappropriate, to say the least, and will not

assist this Court in resolving the former jeopardy issue at hand. Taken as a whole, these malicious asides are an excellent example of the "pound-the-law; pound-the-facts; if neither, pound-the-table" jest passed along to all first year law students. Lockhart urges this Court to treat Nelson's outburst as mere table pounding. If Nelson's fulminations amount to anything of substance, they are a declaration that the criminal justice system ought not to be adversarial in nature, if the accused is overmatched by the state. Not only does this argument have nothing to do with the former jeopardy issue before this Court, but this Court has emphatically rejected the "sporting contest" theory of criminal justice. *See Morris v. Slappy*, 461 U.S. 1, 15 (1983).

B. WHETHER TRIAL ERROR OCCURRED

Below, the Eighth Circuit Court of Appeals felt that no *Burks*-type trial error occurred. According to the Eighth Circuit, no trial error occurred because the state trial court did not make an express ruling on the admissibility of the prior conviction at issue. (*See* app. to Lockhart's *cert.* petition at A-6.) Before this Court, Nelson does not advance this argument — instead, he argues that no trial error occurred because the prior conviction at issue was not "evidence." Nelson contends that because the prior conviction had no existence as a matter of law, it had no existence as a matter of fact and could not, therefore, have been evidence. This Court need not delve into metaphysics in order to resolve this seeming existential crisis: the law has long recognized the distinction between *de facto* and *de jure*. For example, corporations that exist only in fact, as opposed to those corporations that are lawfully incorporated, may enforce contracts and may be the victims of crime, *see* 8 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §§3759-62, 3862, 3888 (rev. perm. ed. 1982); a public office may be filled on a *de facto* basis, *see United States v. Royer*, 268 U.S. 394 (1925); and the judgments of a court that had only a *de facto*, as opposed to a *de jure*, existence are not

subject to collateral attack on that basis, *see Tumbs v. State*, 290 Ark. 214, 718 S.W.2d 105 (1986) and 21 C.J.S. *Courts* §146 (1940). Nelson is simply wrong when he asserts that legal inadmissibility is the equivalent of factual non-existence. The prior conviction at issue existed as a matter of historical fact. It had a tangible form as a piece of paper, a commitment order, memorializing the historical fact of Nelson's conviction of assault with intent to commit rape on March 25, 1960, in the Union County Circuit Court, Union County, Arkansas. (*See* J.A. at 5.) Nelson's argument ignores what actually happened at trial. Rather than acknowledge that, as a matter of fact, the jury *did* consider the prior conviction at issue, Nelson attempts to elevate a theoretical form over the historical substance of this case.[1] *See generally* 1 J. Wigmore, *Evidence in Trials at Common Law* §1 (Tillers rev. ed. 1983) (at least three meanings may be attributed to the term "evidence": (1) the existence of certain facts; (2) the process by which the existence of an unknown fact may be inferred from a known fact; and (3) the body of law that governs whether the fact finder will be allowed to consider a proffered fact).

C. WHETHER PROSECUTING ATTORNEYS WILL OVERTRY CASES

Nelson argues that prosecuting attorneys will not overtry cases if they cannot rely on the correctness of the trial courts' rulings on the admissibility of evidence. According to Nelson, this matter is rather straightforward: prosecuting attorneys present their "best" case and, in so doing, do not present evidence that is "cumulative." According to Nelson, a prosecutor's "best" case is one built upon *all* the evidence that is not cumulative. Nelson's conception of the prosecutor's task is too simple by far. Nelson fails to grasp "what all criminal

---

[1]In this regard, perhaps Nelson's counsel has practiced too long in the Arkansas criminal justice system. *See* Nelson's brief at 29 n.12.

practitioners know": evidentiary facts vary in degrees of persuasive force and in degrees of probability of admission into evidence. Prosecutors in criminal cases cannot marshal their facts without considering the persuasive force and the probability of admission for each fact of itself and also in relation to the other facts that they have to place before the fact finder. In assessing the relative value of each fact, a prosecutor must consider whether other, more persuasive, facts are likely to be admitted into evidence; therefore, a fact is "cumulative" only if other, more persuasive, facts have already been admitted into evidence. For this reason, prosecutors will overtry their cases by proffering all the facts at their command if appellate courts can reverse trial court evidentiary rulings and then disregard the evidence that has just been held to be inadmissible in evaluating the sufficiency of the prosecutors' remaining facts. If all courts follow the Eighth Circuit's reasoning, no evidence, when proffered by the prosecutor at trial, could ever definitely be said to be cumulative.

Moreover, Nelson's conception of the way in which prosecutors assemble their proof — all the facts is the equivalent of the "best" case — is at odds with a corollary of this Court's "trial error" holding in *Burks v. United States*, 437 U.S. 1 (1978): where an appellate court decides that "trial error" occurred at trial, the prosecuting attorney is allowed to gather new evidence to replace the evidence that was held on appeal to be inadmissible. *See United States v. Holzer*, 840 F.2d 1343, 1349 (7th Cir. 1988) and Westen and Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 166 n.362 (1979). If the prosecutor has already presented his or her "best" case by presenting all of the facts, it is pointless to permit the prosecutor to attempt to gather replacement evidence. In this regard, *Burks* is a definite statement of this Court's belief that prosecuting attorneys do not present a case by proffering to the trial court, for its consideration and rulings, *all* the facts at their command.

D. WHETHER APPELLATE COURTS SHOULD CONSIDER ALL OF THE STATE'S EVIDENCE

In the argument section of his brief on the merits, Lockhart argues that an appellate court, in evaluating the sufficiency of the state's proof of the defendant's guilt, should consider evidence that it may have ruled to be inadmissible as well as the state's evidence that was properly admitted. This Court's plurality opinion in *Kuhlmann v. Wilson*, 477 U.S. ___, 106 S. Ct. 2616, 2627 n.17, 91 L.Ed.2d 364, 381-82 n.17 (1986) suggests that Lockhart's argument is correct. In *Kuhlmann*, a plurality of this Court stated that a prisoner held in state custody may be allowed to file a successive petition seeking habeas corpus relief pursuant to 28 U.S.C. §2254 if he can make a "colorable showing of innocence." According to the plurality, in making a colorable showing of innocence a habeas corpus petitioner must make his or her showing in the face of the evidence that was properly admitted against him and in the face of evidence that was unlawfully admitted, if this evidence is probative. The plurality's emphasis in *Kuhlmann* on the petitioner's actual guilt, as measured by *all* the evidence, suggests, albeit remotely, that an appellate court should consider the state's entire case, properly admitted evidence as well as improperly admitted, in determining whether the state put before the fact finder sufficient evidence of the defendant's guilt. *Cf. Webster v. Duckworth*, 767 F.2d 1206, 1215 (7th Cir. 1985) (the sufficiency of the state's proof of the defendant's guilt should be evaluated on appeal on the basis of the evidence that the state proffered to the trial court, not on the basis of the evidence that the trial court actually admitted); *Hunter v. State*, 257 Ga. 571, 574, 361 S.E.2d 787, 789 (1987) (same); *Webster v. State*, 274 Ind. 668, 413 N.E.2d 898 (1980) (same); Westen and Drubel, *Toward a General Theory*, *supra*, at 165-66 (same); and Note, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. Chi. L. Rev. 365, 371-72 (1964) (same).

CONCLUSION

The United States Eighth Circuit Court of Appeals' holding in the instant case that respondent Nelson has a Fourteenth and Fifth Amendment former jeopardy right not to be resentenced as an habitual offender, given the facts of this case, is an incorrect interpretation of these Amendments to the United States Constitution and should be reversed by this Court. Petitioner Lockhart respectfully requests that this Court hold that respondent Nelson does not have a former jeopardy right, given the facts of this case, not to be resentenced as an habitual offender.

Respectfully submitted,

JOHN STEVEN CLARK, ESQ.
Arkansas Attorney General

BY: CLINT MILLER, ESQ.
Assistant Attorney General
200 TOWER BUILDING
4TH & CENTER STREETS
LITTLE ROCK, ARKANSAS 72201
(501) 682-3657

Counsel for Petitioner